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Using Court-Connected ADR to Increase Court Efficiency, Address Party Needs, and Deliver Justice in Massachusetts

Madhawa Palihapitiya

University of Massachusetts Boston, madhawa.palihapitiya@umb.edu

Susan Jeghelian

University of Massachusetts Boston

Kaila Eisenkraft

University of Massachusetts Boston

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Using Court-Connected ADR to Increase Court Efficiency, Address Party Needs, and Deliver Justice in Massachusetts

Research Report

**Massachusetts Office of Public Collaboration
John W. McCormack Graduate School of Policy and Global Studies
University of Massachusetts, Boston**

**Using Court-connected ADR to Increase Court Efficiency, Address
Party Needs, and Deliver Justice in Massachusetts**

Final Research Report

Authored by



Susan Jeghelian, Executive Director
Madhawa Palihapitiya, Associate Director
Kaila Eisenkraft, Research Associate

Massachusetts Office of Public Collaboration
John W. McCormack Graduate School of Policy and Global Studies
University of Massachusetts, Boston

This report presents research and findings from a study of court-connected ADR commissioned by the Executive Office of the Trial Court (EOTC). The study was conducted by the state office of dispute resolution also known as the Massachusetts Office of Public Collaboration at the University of Massachusetts Boston. The office has been serving as a neutral forum and state-level resource for almost 30 years. Its mission is to establish programs and build capacity within public entities for enhanced conflict resolution and intergovernmental and cross-sector collaboration in order to save costs for the state and its citizens and enable effective problem-solving and civic engagement on major public initiatives.

The report is based on a literature review of research publications on court-connected alternative dispute resolution (ADR) from nationally recognized scholars and new research conducted through interviews and surveys. In addition to describing goals and effectiveness of court-connected ADR, the report outlines key effective practices from Massachusetts and elsewhere and offers recommendations for strengthening awareness, access and utilization of court-connected ADR in the commonwealth, including appropriate success measures to demonstrate high-quality, sustainable court-connected ADR. A presentation of highlights from this research was delivered at the Trial Court ADR Conference in June 2019.

The Massachusetts Office of Public Collaboration would like to acknowledge the efforts of the Executive Office of the Trial Court (EOTC) and the Standing Committee on Dispute Resolution in engaging the office to conduct this research and for advising and providing guidance on collecting valuable data.

For further information, please contact:
Massachusetts Office of Public Collaboration
John W. McCormack Graduate School of Policy and Global Studies
University of Massachusetts Boston
100 Morrissey Blvd., M-1-627, Boston, MA 02125
Tel: 617.287.4040
Website: www.umb.edu/mopc

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Introduction

The Massachusetts Office of Public Collaboration (MOPC) is an applied research center of the McCormack Graduate School of Policy and Global Studies at the University of Massachusetts Boston and the state dispute resolution agency for the commonwealth serving the judicial, executive and legislative branches of state government and municipalities (G.L. Ch. 75, s. 46). MOPC is also the grant program administrator for state-sponsored community mediation system (G.L. Ch.75, s. 47). MOPC and the Trial Court have had an ongoing relationship for the design and administration of court-connected alternative dispute resolution (ADR) programs since the mid-1980s, starting with the launch of the first ADR programs in the Superior Courts. MOPC provides expertise at best cost available to the Trial Court.

In Fiscal Year 2019, the Executive Office of the Trial Court (EOTC) contracted MOPC to conduct research on current use and effectiveness of court ADR in Massachusetts and a sample of other states. The research involved undertaking a literature review of existing studies, collecting data on awareness, access and utilization of court-connected ADR through surveys and interviews of select Massachusetts court personnel and court-approved ADR program representatives, and gathering evidence of effective practices and models in Massachusetts and other states on methods to better communicate about ADR programs and formulate strategies for departmental expansion of court-connected ADR with, and without, funding.

MOPC appointed Associate Director Madhawa Palihapitiya to lead a team of researchers comprised of Research Associate Kaila Eisenkraft, UMass Boston Conflict Resolution graduate student Jennifer Waldron, and Harvard Negotiation and Mediation Clinical Program law students, Swechhya Sangroula and Jacob Omorodion. Under the oversight of MOPC Executive Director Susan Jeghelian, the research team developed a methodology and work plan and, during the period of November 2018 through June 2019, engaged in the following activities to develop the research report:

- I. Conducted an extensive literature review of research studies, academic articles and publications on court-connected ADR awareness, access and utilization containing various levels of evidence and data on utilization of court-connected ADR, including ADR screening models, educational methods, data collection on issues of race, implicit bias and procedural fairness, and ADR success measures.
- II. Collected court-connected ADR data from Massachusetts consisting of interviews with 15 court personnel representing different Massachusetts Trial Court Departments and 19 court-approved ADR providers representing different organizations and regions of the state, and input gathered through two surveys from 34 ADR providers and from 28 court personnel who attended the June ADR Conference. These interviews and surveys focused on issues including ADR goals, efficiencies, methods to better communicate about ADR programs, educate

judges and clerks on ADR appropriate case types and access to ADR, ways to measure ADR effectiveness, and formulate strategies for departmental ADR expansion with and without funding.

- III. Conducted a comprehensive review of effective practices for increasing court-connected ADR awareness, access and utilization in Massachusetts and other states. This included a process of benchmarking effective ADR models and practices and the selection of the three most successful models (Maryland, Florida and several New England states).
- IV. Collected and studied Massachusetts-based court-connected ADR documents including Trial Court reports and presentations, annual departmental ADR plans and reports, and ADR outreach materials provided by the Trial Court ADR Coordinator.
- V. Drafted research findings and recommendations for increasing ADR access, awareness and utilization tracked to detailed sections with full citation and a bibliography. Section A was prepared by Kaila Eisenkraft, Section B by Swechhya Sangroula and Jacob Omorodion, Section C by Jennifer Waldron, and Section D by Madhawa Palihapitiya.

The report is organized into the following sections: *Executive Summary* that can serve as a stand-alone document; Preliminary *Findings*, based on an investigation of research on ADR awareness, access and utilization in Massachusetts; Preliminary *Recommendations*, for further increasing court-connected ADR awareness, access and utilization and effective practices and successful models; and *Sections*, presenting detailed, fully-sourced summaries of the research material.

Executive Summary

Alternative Dispute Resolution (ADR) refers to the processes that are available for the resolution of disputes outside formal adjudication. It involves the participation of a third party neutral to help two or more parties resolve a dispute without the direct involvement of the court.¹ One important reason for supporting ADR is for the purpose of efficiency. Courts are increasingly encouraging utilization of ADR because they see value in it.² Many courts in the U.S. have promoted mediation and other ADR processes to encourage settlement, mostly citing “judicial economy” and “convenience” for doing so.³ There has been a widespread interest in ADR over the years, with an increase in its utilization.

There is no doubt that ADR promotes access to justice which is defined as “the creation of paths to resolve conflicts that are within the purview of the formal legal structure by using differentiated strategies such as mediation, early neutral evaluation, arbitration, and the many combinations of other methodologies all designed to promote early swift resolution of conflicts.”⁴

Massachusetts courts joined other state courts in a national movement, dating from the 1960s, to provide access to justice through alternative dispute resolution.⁵ The first court-connected (or court-annexed)⁶ mediation program in the commonwealth was established in 1975 in Boston’s Dorchester neighborhood, and by 1986, mediation services were available through 37 of 62 Massachusetts district courts.⁷ At present, the forms of ADR offered for civil disputes through the Massachusetts judicial system include mediation, conciliation, case evaluation, arbitration, mini-trial, summary jury

¹ United Nations Development Program. Programming for Justice: Access for All – A Practitioner’s ... (n.d.). Retrieved from <https://www.un.org/ruleoflaw/blog/document/programming-for-justice-access-for-all-a-practitioners-guide-to-a-human-rights-based-approach-to-access-to-justice/>

² Shavell, S. (1995). Alternative Dispute Resolution: An Economic Analysis. *The Journal of Legal Studies*, 24(1), 1-28. Retrieved from <http://www.jstor.org/stable/724588>

³ Nolan-Haley, & M., J. (2013, April 13). Judicial Review of Mediated Settlement Agreements: Improving Mediation with Consent? Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2249862

⁴ Davis, W. & Turku, H. (2011). Access to justice and alternative dispute resolution. *Journal of Dispute Resolution*, 2011(1), 47-66., p. 50.

⁵ Mack, K. (2003). *Court referral to ADR: Criteria and research*. Melbourne, Australia: Australian Institute of Judicial Administration Inc. and the National Dispute Resolution Advisory Council (defining ADR as “structured methods of resolving disputes other than formal court-based adjudication”), at 1.

⁶ Definition of court-connected (also known as court-annexed) ADR as “any practice or program in which a court may refer civil disputes to an ADR process, whether such referrals are voluntary or mandatory or whether the ADR service is provided by the court or externally.” Mack (2003), *ibid.*, at 5.

⁷ Davis, A. (1986, January). *Community mediation in Massachusetts: A decade of development, 1975-1985*. Boston, MA: Administrative Office of the District Court, Trial Court of the Commonwealth.

trial, and dispute intervention.⁸ Settlement conferences are also available upon a due process hearing request.⁹

Notwithstanding state level ADR initiatives such as the establishment of a state office of dispute resolution (the Massachusetts Office of Public Collaboration or MOPC)¹⁰ and the formulation of court rules regulating court-connected ADR (except settlement conferences).¹¹ State support for court-connected ADR hit a low point in FY 2009 when an economic downturn led the court to divert funding for court-connected ADR programs to other purposes.

A recent infusion of state funds supporting court-connected ADR in Fiscal Year 2019 prompted the Trial Court to investigate ways to reinvigorate and expand the role of ADR in the courts so as to increase ADR awareness, access, and utilization. To that end, the research literature on court-connected ADR was examined by MOPC's research arm for evidence concerning the effectiveness of different types of ADR processes and of different structural elements of ADR delivery in meeting court goals for ADR in civil cases. In addition, MOPC launched surveys and interviews to collect data from ADR providers and key court personnel in Massachusetts while also conducting research to identify effective practices for ADR awareness, access and utilization in New England and other states throughout the country.

MOPC's research found that the various Massachusetts Trial Court Departments had some specific approaches to and goals for utilizing court-connected ADR. These approaches and goals largely aligned with the Uniform Rules and research findings identified in the literature. Court interviewees cited the Uniform Rules, particularly the stated goal in the Rules of offering parties more choices in resolving their dispute(s) as one of the key macro-level goals of utilizing ADR.

⁸ See brochure issued by the Trial Court Standing Committee on Dispute Resolution. (n.d.) *A guide to court-connected alternative dispute resolution services*. Massachusetts Supreme Judicial Court. Retrieved April 25, 2019, from <https://www.mass.gov/files/documents/2016/08/pg/ccadr0601large.pdf>

⁹ See Mass.gov. Learn about settlement conferences. Retrieved May 31, 2019, from <https://www.mass.gov/service-details/learn-about-settlement-conferences>

¹⁰ Massachusetts' dispute resolution agency started out as a pilot project, the Massachusetts Mediation Service, in 1985. It became the state agency for dispute resolution (i.e., the Massachusetts Office of Dispute Resolution) in 1990 under G.L. Ch. 7, section 51. In 2005, pursuant to G.L. Ch. 75, section 46, the agency was relocated from the Executive Office to the University of Massachusetts Boston, and in 2010, renamed itself the Massachusetts Office of Public Collaboration. (UMass Boston, Massachusetts Office of Public Collaboration. Who We Are. Available at https://www.umb.edu/mopc/about_us).

¹¹ After a ten-year effort, Massachusetts' Uniform Rules on Dispute Resolution were adopted by the Supreme Judicial Court in 1998, became effective in 1999, and subsequently revised in the 2000s. (Trial Court Standing Committee on Dispute Resolution. (2005, June). *Supreme Judicial Court Rule 1:18: The Uniform Rules on Dispute Resolution including explanatory and implementation materials*. Retrieved April 25, 2019, from <https://www.mass.gov/files/documents/2016/08/tl/newadrbook.pdf>).

The Uniform Rules on Dispute Resolution, which took effect in 1999, “govern court-connected dispute resolution services provided in civil and criminal cases in every department of the Trial Court” in Massachusetts.

Rule 2 of the Uniform Rules defines “court-connected dispute resolution services” as dispute resolution services provided as the result of a referral by a court. “To refer” means to provide a party to a case with the name of one or more dispute resolution services providers or to direct a party to a particular dispute resolution service provider.

As per the Uniform Rules, each Trial Court Department approves listed providers to receive referrals from judges and other court staff for ADR services. Rule 8 sets out qualification standards for the providers, and Rule 9 sets out ethical standards for providers, including court staff neutrals, when providing court-connected dispute resolution services.

MOPC’s research indicates that court-connected ADR awareness, access and utilization in Massachusetts can be improved. The extensive research MOPC has done is intended to help the Trial Court and all stakeholders of court-connected ADR in further improving ADR awareness, access and utilization to meet the aspirations of all parties concerned.

This report underlines several key findings and recommendations for improving ADR awareness, access and utilization in Massachusetts. Methods that help raise awareness in access, awareness, and utilization of court-connected ADR include: use of a robust website, with links to a multitude of options litigants’ might need to utilize court-connected ADR; court ADR personnel to help better inform litigants and the public at large about court-connected ADR; adjudicators informing litigants and attorneys about the benefits and availability of court-connected ADR; community outreach as a means of mainstreaming court-connected ADR; keeping financial costs to litigants low or free to incentivize ADR use; utilizing mandatory mediation; securing a consistent funding source for ADR; mainstreaming the process of referring cases to ADR; and having rigorous standards for ADR neutrals to ensure parity of mediation experience for parties. Understanding that there is not a “one size fits all” approach to court-connected ADR is valuable. Mainstreaming the use of mediation and other forms of ADR in the Trial Court case management system is prudent moving forward. Each of the states benchmarked, in addition to Massachusetts, utilize varying degrees of the methods mentioned above to increase access, awareness, and utilization of ADR in their respective court systems.

Findings on Court-Connected ADR Awareness, Access and Utilization

The following abstracted findings are supported by evidence in the detailed, fully-sourced report sections.

1. **Goals for utilizing ADR vary but align, and sometimes go beyond the goals in the Uniform Rules.** While a clear goal for utilizing ADR in the Massachusetts Trial Court is to increase court efficiency, the research identified other goals like increasing confidence and trust in the court, improving party outcomes (preserving party relationships, reducing costs and time etc.) promoting access to justice, providing multiple options for resolution of disputes as an alternative to trial. Asked whether ADR is useful in meeting any of the following goals, survey responders cited lighter court caseload (89.29%) (n=25), increase speed in closing cases (89.29%) (n=25), meeting parties' needs (89.29%) (n=25), earlier settlement of disputes 92.59% (n=25); as well as increase access to justice (78.57%), increase public trust and confidence (78.57%) and lower financial costs to parties (77.78%) as the main goals for utilizing ADR. A majority of the responders also identified lower financial costs for court 55.56% (n=15) as a key goal for ADR utilization in the Massachusetts Trial Court.
2. **ADR utilization in the Massachusetts Trial Court can be further improved.** Currently, in many court departments, ADR utilization is low. This is due to many reasons including varying degrees of ADR awareness among court personnel, attorneys and the parties themselves, party choice, and the availability and capacity of ADR providers. According to survey results, ADR is often used in the District Court (54%) (n=6) and the Probate & Family Court (50%) (n=4). The Juvenile Court refers ADR often as well (25% of the time or n=1). One hundred percent of the survey responders from the housing court (n=2) and the land court (n=1) indicated ADR referral to be not applicable. Interestingly, 27% of the responders from the District Court (n=3) also identified ADR referral to be not applicable.
3. ***A diverse set of factors influence court-connected ADR utilization in Massachusetts:*** According to the research survey, the most significant factors for utilizing court-connected ADR is the likelihood of early settlement (100%) ((n=28); reducing financial costs to litigants, and speedier resolution of disputes (96%) (n=27); increasing party compliance and potential for clarifying issues (92%) (n=25); court efficiency or time and cost efficiencies to the court (88%) (n=24); the availability of ADR programs and neutrals (85%) (n=23); party relationships (69%) (n=18) and the fact that at least one party is pro se (62%) (n=17).
4. ***A variety of reasons affect the underutilization of court-connected ADR in Massachusetts:*** These include party choice; variations in ADR awareness within the different Trial Court departments; a lack of ADR awareness among the parties, court personnel, attorneys and judges; unavailability of offline and online information on ADR; inability of ADR providers to be available on-site or capacity and to recruit and/or retaining a steady ADR workforce; Judges' preference for certain ADR processes over others; lack of incentive for attorneys to refer cases to ADR or ensure

compliance with Rule 5; the dispersed nature of the court system and difficulties in centralizing ADR administration; and the predominant culture of promoting litigation/adjudication over ADR.

5. ***ADR awareness among litigants is low, but can increase as they experience ADR firsthand:*** Survey results indicate that litigant understanding of ADR is low when they first arrive for a court hearing or conference and that attending an ADR screening can help litigants understand the ADR process. However, the majority agree that litigants' awareness of ADR increases particularly when they begin their first ADR session.
6. ***Increased ADR awareness among judges and lawyers can help increase ADR utilization:*** The overwhelming majority of survey responders indicated that ADR awareness among attorneys, litigants, and the public would be very useful in increasing ADR utilization (81%) (n=21). Large majorities of the survey responders also agreed that awareness of court-connected ADR among judges and court personnel and more information about ADR programs (80%) (n=20) would be very useful. Survey responders also cited that the commitment of the judicial system to using ADR (74%) (n=20); earlier notification about availability of ADR to litigants/attorneys (70%) (n=19); ADR training for judges and court personnel (53%) (n=14) and having a larger pool of qualified neutrals to refer cases to (51%) (n=14) would be very useful and a majority (50%) (n=13) indicated that discussions with peers about the use of ADR would be somewhat useful.
7. **The departments of the Massachusetts Trial Court differ in their promotion of court-connected ADR services.** The seven departments within the Massachusetts Trial Court differ in terms of promoting awareness, access, and utilization of court-connected ADR. The study finds that some courts are more active than others in making litigants aware of the ADR opportunities available to them and making referrals to providers for ADR. To some degree, this reflects the importance of individual judges and clerks in creating a culture that is supportive of ADR. However, the differences also reflect some structural features of the various departments. Courts that handle a high volume of simple, low dollar value cases, such as the District Courts, tend to have a very different approach to ADR than courts that handle complex, high dollar value cases, such as the Superior Court. In part this is because the referral process is more institutionalized in the District Courts, and in part it reflects the greater presence of attorneys in higher-value cases, who can advise litigants about ADR. In certain departments, practicing attorneys tend to be more knowledgeable and supportive of ADR than in others; when this is the case, attorneys can be a strong factor in encouraging litigants to use ADR. This builds upon the obligation of attorneys to advise litigants about ADR under Rule 5 of the Uniform Rules on Dispute Resolution.
8. **The promotion of ADR within courts tends to rely on specific individuals, rather than on institutional supports.** The study reveals that in courts that are relatively more active in ADR than their counterparts, ADR providers believe that individual judges and court staff (especially clerks) led the initiative to promote ADR. In other

words, individuals at the court who believe that ADR is beneficial for the court tended to be proactive in talking to the litigants, making them aware of the ADR options available to them, making more referrals for ADR, and promoting “conciliatory justice.” By contrast, some courts lagged in promoting ADR, as shown by low referral rates. Providers surmised that the potential reasons for this could be the low willingness of the court to promote ADR. While appreciable, the providers observed that promotion of ADR based on individual leadership is not sustainable simply because when judges and staff who promote ADR leave, there is no longer anyone present at the court who will continue these positive changes.

9. ***Attorney supported ADR resulted in positive results and a higher favorability for mediation:*** Given their function to guide parties and conduct the case, attorneys can be a critical conduit to increasing utilization of court-connected ADR. According to available research, more mediation preparation from attorneys lowered the probability that parties would experience settlement pressure while elevating the probability that they would settle. Parties were also able to tell their story and contribute to the outcome, were respectfully treated by the mediator, considered the mediator as impartial, and viewed the ADR process and settlement to be fair. Learning about mediation from other (non-attorney) sources might diminish parties’ inclination to settle or be positive about mediation.
10. ***Accommodating discovery needs, rule enforcement, and judicial encouragement of ADR can promote ADR promotion with parties as well as actual use of ADR:*** According to published research, among the three most influential factors affecting the probability that attorneys would counsel clients to try ADR, attorney experience with using ADR in a case was the most impactful. Attorney practice as a neutral was the second-most influential factor, with attendance in a continuing legal education course in dispute resolution the least influential of the three. To motivate attorneys to learn more about and use ADR, confer-and-report rules were adopted in at least five states – Arizona, Alaska, Indiana, Minnesota, and Massachusetts (both Massachusetts’ state courts and federal district court). The rule required lawyers to confer with one another early in the litigation process about using ADR to settle the case, report their discussion to the court, and confer with the judge in the event of disagreement.
11. ***Judges have the strongest influence on ADR utilization by attorneys and disputing parties:*** According to published research, the frequency of ADR discussions between attorneys was related to the frequency with which judges suggested ADR. Survey responders agreed that the judge’s role in educating litigants and attorneys and referring cases to ADR is indispensable. The information that judges provide in personal interactions with litigants and/or their attorneys was by far the most successful practice for raising ADR awareness in Massachusetts. This was followed by the role of the administrative staff and the ADR coordinator.
12. ***ADR coordinators and clerk magistrates play a vital role in promoting court-connected ADR:*** Survey responders also indicated that the role of the ADR coordinator in their court was indispensable or important. A majority of the survey

responders also agreed that the role played by the clerk magistrates in referring cases to ADR was important. The majority of the responders also acknowledged the role played by the ADR providers in promoting court-connected ADR. Others noted in the interviews the importance of person-to-person contact in promoting ADR in court, the importance of having a dedicated ADR center in each court department and utilizing existing Court Service Centers to further promote ADR awareness.

13. ***Education about ADR is key to ADR utilization:*** Published literature and effective practices from other States indicate that ADR education should reach the public, litigants, attorneys, and judges. In the research literature, a number of judges recommended imposing requirements on litigants to attend in-person or video presentations about ADR provided by a judge, court staff, or ADR provider; on attorneys to discuss and contrast ADR and litigation with clients; and on the court to mandate participation in ADR before or soon after filing. For themselves, judges unanimously rejected educational mandates, favoring access to educational opportunities, such as courses or conversations with peers, instead.
14. ***The court's focus on fulfilling party needs and interests as an ADR goal may shield the court from overly focusing on the traditional definition of court efficiency:*** A focus on party concerns will introduce ADR standards for furthering party interests that can serve as a counter-weight to the court's efficiency interests. The pursuit of court efficiency through the use of court-connected ADR, reinforced by mandatory ADR participation, has led to warnings about the elevated risk that ADR might be undermined. Inappropriate cases might be referred to ADR in an effort to reduce the court's workload. To cut delays, ADR sessions might be curtailed. To raise settlement rates, ADR referrals might prioritize cases more conducive to settlement, effectively restricting the ADR access of more challenging cases. The focus on settlements might induce greater use of directive tactics by practitioners or increase settlement pressure on parties. ADR quality or process fairness might be sacrificed to quantity.
15. ***ADR providers have focused on improving access for litigants and see room for the court to improve litigant awareness of ADR. However, providers struggle to obtain reliable data from litigants to evaluate their services.*** Court-connected ADR providers have made efforts to make their services accessible to litigants and generally consider this to be functioning well. Those who charge fees use sliding scales or fee waivers for indigent clients, make their offices accessible to those with disabilities, and engage in process adaptations to address the specific needs of litigants. Many providers stated that the level of ADR awareness among litigants before entering the courtroom is low. They remarked consistently that litigants enter the court with "next to no" information about ADR. Providers stated that litigants almost always only learn about ADR once they arrive at the court.
16. ***ADR providers depend upon individual relationships and professional networks to get cases, creating barriers to entry for new professionals from more diverse backgrounds.*** The study reveals that personal networking and relationship building

with court staff, particularly judges and clerks, is essential to receiving more court-referred ADR cases.

17. **Providers are less diverse than the populations they serve, with consequences for the profession and for the public at large.** Many court-connected ADR providers identified a lack of diversity within their rosters. Despite serving communities of diverse racial, cultural and socio-economic backgrounds, their roster was disproportionately white and included individuals from a relatively higher income group.
18. **There is an uneven distribution of court-referred ADR cases among providers: some have plenty to handle while others are underutilized.** The study reveals that there is an uneven distribution of referrals among providers. Some ADR providers stated that they have a sizable volume of court referrals; others suggested that they did not have enough cases to work on. The volume of referrals is related to the reputation-driven nature of the referral process, and to the reliance upon individual judges and court staff for creating a culture that is supportive of ADR in the courts. Judicial turnover can significantly affect the volume of referrals, which inhibits the ability of providers to plan for the long term.

Recommendations for Increasing ADR Awareness, Access and Utilization

The following recommendations are supported by the evidence-based findings abstracted above and presented in detail in the report sections.

1. ***Conduct screening and referral of cases appropriate for ADR soon after filing where possible:*** There needs to be a system put in place to identify cases suitable for referral to ADR soon after they are filed, and then have them referred to ADR. Early education, screening and referral can prove critical to the success of court-approved ADR.
2. ***Make available dedicated ADR Coordinators at each court, where possible:*** Rule 3(d) of the Uniform Rules requires that within every Trial Court department, one court staff member be designated as the dispute resolution services coordinator. A dedicated and knowledgeable ADR coordinator should be available in all Departments and local divisions of the Trial Court. These dedicated court staff resources should be clearly identifiable and accessible and carry out all functions related to ADR, such as: providing awareness, liaising with the providers, and building a bridge between the court, litigants, attorneys, and the providers.
3. ***Establish more on-site ADR programs:*** The convenience afforded to courts from on-site ADR programs is great. Such programs could help increase ADR awareness, access and utilization almost immediately. However, a strong demand for ADR on-site is currently not met with ADR provider availability and capacity. Creating on-site programs would require a steady stream of case referrals and resources for ADR providers including space and monetary compensation for provider time. Not all courts would be able to support an on-site presence either. But those that can would benefit from such on-site programs.
4. ***Judges and attorneys should promote ADR whenever possible, but judges should not be the “educator of first resort”:*** Judges should encourage attorneys to ensure compliance with Rule 5 by promoting ADR as an option whenever possible. Judges should be trained in ADR and educated on the available ADR options. Effective practice strategies of discussing ADR as opposed to forcing the ADR option on lawyers and disputing parties should be upheld to prevent any encroaching on the attorney-client relationships.
5. ***Provide ADR awareness and education to litigants before they come to court:*** develop a detailed, easily navigable and dedicated ADR website with educational

material and results of ADR utilization available to the general public. This is in-keeping with the majority of the survey responders (52% or $n=13$) strongly agreed that information should be provided to litigants before they arrive in court through online materials. The website should also list the available ADR options, the differences between the options and contact information of providers where necessary.

6. ***Court-connected ADR education and training should include a mandatory firsthand experience for court personnel and litigants:*** New lawyers and judges are increasingly more aware of ADR and hence stand to utilize ADR more often. Parties who come to court have seldom had any experience with ADR, and neither have all court personnel who interact regularly with parties. It would be helpful for parties to have a mandatory ADR screening experience in court where possible before they decide to opt-in or out of ADR. It would also be useful for court personnel to have a mandatory experience with ADR before they educate parties about its benefits. A key finding for increasing ADR utilization is also to educate and train court personnel. Additionally, having court personnel experience ADR firsthand can help them promote ADR processes in court. It might also be beneficial to reexamine the provision of an early intervention ADR screening in which face to face ADR information could be provided to parties and their attorneys.
7. ***Communications about ADR should be in everyday language and translated to convey information:*** The information should also the available ADR processes along with the procedures and forms needed to access ADR. Communications about ADR should also distinguish the different ADR processes from one another and from adjudication. According to reviewed literature, informational material about ADR should be distributed by the court to parties, especially pro se parties, upon initial court contact, and plaintiffs should send ADR material to defendants together with the complaint. Electronic access to written informational materials and forms as well as to spoken/visual presentations and videos should be provided through a user-friendly court web-site that also contains links to sites with information about specific ADR programs.
8. ***Provide financial supports to courts and ADR providers to hire staff and to sustain enable volunteer-based ADR services:*** Threading together most recommendations is the importance of consistent public funding for the provision of court-connected ADR services and of increased funding for ADR-related court infrastructure in order to improve service delivery, hire dedicated court ADR coordinators, provide informational resources, deliver training, fund

improved spaces for onsite ADR sessions, expand fee waivers, help mitigate transportation difficulties, improve the collection of litigant evaluations, and much more. Notably, 64% of the court personnel surveyed indicated the need to provide more state funding for court-connected ADR programs. These financial supports for volunteer-based providers like community mediation centers would help them recruit and/or retain a quality ADR workforce, making the centers more sustainable, resulting in a more reliable resource to local courts that need those services. Space in court is also at a premium in many courts, therefore more creative measures are needed to ensure an on-site presence for these providers, for example, through an ADR brock day.

9. ***Promote the creation of a consistent institutional culture of utilizing ADR across different Trial Court Departments:*** Put in place or improve institutional mechanisms for translating judge proactivity for ADR into a court culture, so that the promotion of ADR does not depend entirely on individual personalities within the court, but would instead be embedded in the system. Some interviewed court personnel noted the need for systemic/structural adjustments in order to integrate ADR into the Trial Court. This included ideas for changing the terminology used to frame ADR from “Alternative” to “Appropriate” Dispute Resolution as well as educations and other structural changes supports like funding for mediation that would further cement ADR as an institutional resource for the Trial Court.

10. ***Strive to achieve a balance between uniformity in ADR awareness, access and utilization with respect for local court/court department autonomy and diversity:*** A lack of uniformity among individual courts in a particular judicial system could make access to ADR uneven: readily available in some courts, less so in others. The measures used to ensure equitable access to court-connected ADR have varied with different judicial systems. New Mexico’s court system might provide some guidance in this regard. The state established a centralized statewide ADR Commission to simplify centralized services and furnish broad guidelines and support to individual courts for effective ADR programs that were responsive to local needs and circumstances. Consistent with New Mexico’s court standard for access to justice, namely, that ADR be available irrespective of the locality or the financial situation of the court, this state commission provides funding and other assistance to under-resourced courts to enable implementation of ADR programming comparable in quality to that of other courts.

11. ***Build ADR practitioner experience by providing a steady stream of cases to ADR practitioners and by rotating referrals among the available ADR providers/practitioners whenever possible:*** Studies indicate that the greater the amount of experience that the practitioner had with ADR, the lower the probability that parties would feel heard and understood. In the long-term, substantial ADR experience also made it less likely that parties would return to court during the following year. Rotating referrals among practitioners may be a way to expand their ADR experience and thereby increase the number of experienced ADR practitioners to whom parties can turn. Implementation of these proposals needs to be examined for feasibility and effectiveness.

12. ***Support the replication of existing successful ADR practices and models:*** The research uncovered two successful ADR models and numerous effective practices for increasing ADR access, awareness and utilization in Massachusetts that requires attention, particularly as the Trial Court moves ahead with further institutionalizing court-connected ADR. Among the most impressive models identified is the Salem Probate & Family Court model and the Hampshire Probate & Family Court model. These effective practices and models should be shared with other judges and local courts/court departments for them to consider replication where possible.

13. ***Conduct further research to develop widely accepted and appropriate measures for evaluating court-connected ADR from the perspective of litigants:*** Of particular importance is dedicating resources to study effective ways of measuring ADR success from the perspective of litigants and improving provider evaluation systems. A focused study on different ways of measuring success for litigants and attorneys and how to improve existing court and provider self-evaluation systems should be carried out. In particular, methods to improve response rate should be studied. This recommendation is consistent with the courts' duty, under Rule 6(g) of the Uniform Rules, to compile data regularly to track cases and monitor services, and with providers' duty, under Rule 7(a), to continually evaluate their programs. The court case management system could be useful in tracking ADR related data to demonstrate utilization and party outcomes. However, in order for the system to start collecting information, the Trial Court might have to define what types of data it needs to demonstrate the success of court-connected ADR in Massachusetts, and to identify ways to collect and analyze that information. The court should also reexamine its ADR success measures and focus more on party gains such as the preservation of party relationships.

14. ***Increase confidence in ADR utilization by further enhancing ADR quality standards:*** Evidence from successful court-connected ADR programs benchmarked in this study found that they all maintain quality standards from ADR providers, which translates into greater public and court confidence and utilization of ADR services. Both Maryland and Florida have rigorous standards for court-connected mediators. In Florida, for example, court-connected mediation is based on a point system. Mediators need a minimum of 100 points to qualify to mediate in their courts—which includes metrics such as level of education and experience.
15. ***Support increased diversity among ADR Professionals:*** Rule 7(b) of the Uniform Rules requires providers to actively strive to achieve diversity among staff, neutrals, and volunteers. To address the lack of diversity among staff, neutrals, and volunteers in many court-connected ADR provider organizations, a study panel should be created to study the diversity of court-connected ADR providers and make recommendations for inclusion, as appropriate.

Section A: A Review of the Court-connected ADR Literature

As part of the study commissioned by the EOTC, MOPC conducted a comprehensive review of all relevant literature published to date and a review of effective practices for increasing court-connected ADR awareness, access and utilization in MA and other states. The literature review below contains review of literature with various levels of evidence on utilization of court-connected ADR, including ADR goals, effectiveness measures, screening models, educational methods, issues of race, implicit bias and procedural fairness, and ADR success measures.

I. Goals to be met through ADR

The success or effectiveness of any venture is commonly determined by the extent to which specified goals are met.¹² The standards and criteria used as measures of success and effectiveness are a function of these goals. Moreover, failure to clearly specify appropriate goals may impede implementation of effective ADR programs.¹³ And so, when the New Mexico judiciary undertook to improve its utilization of ADR, it was advised that “identifying program goals enables stakeholders to select an appropriate form or forms of ADR best suited to accomplishing those goals, define quality, and monitor and evaluate the subsequent implementation of the program”¹⁴ Similarly, clarity about the ADR goals to be achieved would be invaluable to the Trial Court’s planning for a more productive use of court-connected ADR that would positively impact awareness, access, and utilization.¹⁵

The numerous goals attributed to or proposed for court-connected ADR¹⁶ can be grouped into three broad categories of overarching goals: ensuring the delivery of

¹² Mack, 2003, *supra* note 5.

¹³ “The primary barriers to the broad implementation of such programs can be summarized as follows: first and foremost, a lack of financial support and, second, a lack of clarity in defining the goals of court ADR—goals that need to strike an appropriate balance between fairness, justice, effectiveness, benefits to the parties, and efficiency. More generally, an investment in the status quo—by judges, attorneys, and even at times by ADR administrators and neutrals—is hindering the needed changes from taking place.” (Boyarin, Y. (2012). Court-connected ADR – A time of crisis, a time of change. *Family Court Review*, 50:3, 377-404, 390.)

¹⁴ Griller, G., Savage, C., Kelly, K., Friess, E., & Sayles, D. (2011, April 15). *Advancing alternative dispute resolution in the New Mexico judiciary: Key strategies to save time and money*. National Center for State Courts, at 64.

¹⁵ “What is important to acknowledge at this point is that how a court defines the primary purpose of its program, and how that court prioritizes the values and interests its program could serve, could dramatically affect that court’s thinking about which model or system for delivering ADR services is most attractive.” (Brazil, W.D. (1999). Comparing structures for the delivery of ADR services by courts: Critical values and concerns, *Ohio State Journal on Dispute Resolution*, 14:3, 715-811, 718. Retrieved May 2, 2019, from <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1182&context=facpubs>); see also Kulp, H.S. (2013). Increasing referrals to small claims mediation programs: Model to improve access to justice. *Cardozo Journal of Conflict Resolution*, 14, 361-393, 370.

¹⁶ The list of examples of court-connected ADR goals mentioned in the literature is long and includes reducing delays, clearing lists, assisting in case management, reducing party costs, producing fair

justice, enhancing court operations, and addressing parties' needs and interests. These overarching goals correspond to three components of the court's basic function of resolving legal disputes and administering justice according to the law¹⁷ – that is, the parties who are the principal recipients of the court's actions, the delivery of justice by producing just outcomes through just procedures, and the implementation of court procedures through which justice is delivered.¹⁸ Although initiatives undertaken to fulfill these goals may conflict, the goals are not per se incompatible and any combination of the goals may be adopted.¹⁹ To date, the court-connected ADR literature has given short shrift to mini-trials, summary jury trials, conciliation, and dispute intervention, focusing instead on five court-connected ADR processes – mediation, neutral evaluation (called early neutral evaluation when conducted early in the litigation process), arbitration, and settlement conferences – and on such structural process features as the role of party choice, access to justice, the organization of ADR administration, legal representation, among others.

II. The role of evidence

Claims about the contribution made by these ADR processes and structural features to the achievement of the aforementioned goals have been variously supported by

outcomes, producing lasting agreements, preserving party relationship, producing party satisfaction with process and outcome, increasing respect for justice system, changing legal culture, giving parties voice, saving parties' time, increasing parties' understanding of process, empowering parties, changing dispute resolution process, providing for party self-determination, among others. (See Mack, 2001, *supra* note 5 at fn. 1).

¹⁷ This description applies to courts in the western world. See Walker, D. (1980). *The Oxford companion to law*. Oxford, England: Oxford University Press, at 301.

¹⁸ The broad goals specified above align with the concerns for justice, party needs, and court efficiency that are referenced in court goals for ADR discussed in the court-connected ADR literature. The rationale for the authorization of ADR in the federal court system included "greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements" (the Alternative Dispute Resolution Act of 1998, available at <https://www.govinfo.gov/content/pkg/PLAW-105publ315/pdf/PLAW-105publ315.pdf>). In a study of a pilot ADR program in the Southern District of New York federal court, federal court ADR seeks to "to reduce the time and expense required to dispose of civil litigation," "to deliver the same actual or perceive quality of justice," (Stephenson, H.B. (1987, June). *An evaluation of the mediation and arbitration program in the Southern District of New York (in cooperation with the American Arbitration Association*. Institute for Court Management, Court Executive Development Program). According to Folberg and associates, California court goals largely consisted of "increasing access to justice, increasing the efficiency of the courts, and producing the best and fairest outcomes for litigants" (Folberg, J., Rosenberg, J., & Barrett, R. (1992, Spring). Use of ADR in California Courts: Findings & Proposals. *University of San Francisco Law Review*, 26, 343-443, 357). In her analysis of the relationship between mediation and procedural justice, Welsh notes that "some of the courts' most important goals—[are] delivering justice, delivering resolution, and fostering respect for the important public institution of the judiciary." (Welsh, N.A. (2001). Making deals in court-connected mediation: What's justice got to do with it. *Washington University Law Quarterly*, 79, 787-861, 792. Retrieved May 29, 2019, from https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1414&context=law_lawreview)

¹⁹ Mack (2003), *supra* note 5.

evidence – broadly defined as reasons to believe²⁰ – arising from three sources: research-based evidence generated by experimental, quasi-experimental, and observational studies,²¹ anecdotal evidence provided by accounts of personal experiences or observations,²² and conceptual evidence drawn from logical or common-sense analyses of the ideas, principles, and theories ascribed to the different kinds of ADR processes and structural features.²³ Research-based evidence is widely considered the most robust.²⁴ However, a degree of caution should be exercised in accepting even research results.

The court-connected ADR processes under study were implemented processes, and the implementation of a given ADR process may not comport with the theoretical description or the typical definition of the process. As commonly understood, mediation entails discussions between disputants, assisted by a neutral third party, that aim to reach a mutually satisfactory agreement; court-connected arbitration involves the settlement of a dispute through a (binding or non-binding) decision from a neutral who heard the evidence and arguments presented by disputants; in neutral evaluation, disputants obtain an assessment regarding the strengths and weaknesses of their positions and the likely outcome of trial from a neutral third party with expertise in the disputed matter; at settlement conferences, a judge or some other designated third party meets with parties and attorneys to evaluate the case and facilitate a pre-trial settlement; summary jury trials and mini-trials are trial simulations where attorneys present their case to the other side before negotiating (mini-trial) or to a judge or jury for a non-binding verdict (summary jury trial).²⁵ These descriptions or definitions,

²⁰ See the definition of “evidence” as “one or more reasons for believing that something is or is not true” in the Cambridge English Dictionary. Retrieved April 28, 2019, from <https://dictionary.cambridge.org/us/dictionary/english/evidence>

²¹ Experimental studies, incorporating the most rigorous research design, test the effects of an intervention by randomly assigning subjects to the intervention or an alternative. The omission of random selection differentiates quasi-experimental from experimental studies. (See Dinardo, J. (2008). Natural experiments and quasi-natural experiments. In Durlauf, S. & Blume, L. E. (Eds.). *The New Palgrave Dictionary of Economics*, UK: Palgrave Macmillan UK, pp. 856–859). In observational studies, the least rigorous of the research designs, investigators observe the consequences of an intervention that they neither manipulate nor control. (See definition of “observational study” in *NCI Dictionary of Cancer Terms*, National Cancer Institute, National Institute of Health, USA.gov. Retrieved April 26, 2019, from <https://www.cancer.gov/publications/dictionaries/cancer-terms/def/observational-study>). Generally, the strength of study results will vary with the rigor of the research design, among such other features as statistical significance and effect size.

²² See definition of “anecdotal evidence” in *Merriam-Webster*. Retrieved April 26, 2019, from <https://www.merriam-webster.com/dictionary/anecdotal%20evidence>

²³ Texas Educational Agency. (n.d.). Differentiate among empirical, anecdotal, and logical evidence. Texas Gateway for Online Resources. Retrieved April 26, 2019, from <https://www.texasgateway.org/resource/differentiate-among-empirical-anecdotal-and-logical-evidence-english-ii-reading>. See also, Mack, 2003, *supra* note 1.

²⁴ See, for example, Winona State University, Evidence based practice toolkit. Retrieved April, 26, 2019, from <https://libguides.winona.edu/c.php?g=11614&p=61584>

²⁵ See e.g., American Bar Association. (2006). What you need to know about dispute resolution: The guide to dispute resolution processes. ABA Section of Dispute Resolution. Retrieved March 15, 2016, from http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/draftbrochure.

however, fail to take into account the variations that are introduced when the court-connected ADR process is actually implemented.

Notably, the distinctions between the different modes of dispute resolution are not always maintained in practice. According to an analysis of ADR in federal district courts, the practice of early neutral evaluation (neutral evaluation conducted early in litigation) appeared only nominally different from evaluative mediation, which may have factored into the District of Columbia district court's decision to eliminate its early neutral evaluation program as superfluous to its mediation program.²⁶ An account of court-connected mediation programs in the Florida judicial system reported how some programs adopted court norms and practices – including holding mediation sessions on court premises, using agreement forms that incorporated legal boilerplate, and evaluating program effectiveness by way of mediation's impact on the court's caseload – in order to capitalize on the court's authority, which may have diminished mediation's key function to empower party voice and choice.²⁷ The growing affinity of court-connected mediation with settlement conferences – arising from such developments in court-connected mediation as the expanded use of private mediation sessions or caucuses at the expense of joint sessions with both sides, the increasing frequency of party non-attendance at mediations, the enlarged role of attorneys during mediation sessions, and the growth of evaluative practices performed by mediators – was pointed out in a discussion of the threat from such developments to the mediation principle of self-determination.²⁸ Indeed, doubts were raised about the usefulness of US mediation research for Australian purposes because mediation practice in the States seemed more directive or evaluative than Australian mediation.²⁹ Likewise, the variety of real-world conditions that characterize ADR's implementation may limit the applicability of investigation results even to domestic versions of court-connected ADR. In several studies of general civil mediation, the type of mediation (e.g. facilitative, evaluative) was

[authcheckdam.pdf](#); Dana, H. H., Jr. (2005). Court-connected alternative dispute resolution in Maine. *Maine Law Review*, 57:2, 349-447; Holbrook, J.R. & Gray, L.M. (1995). Court-annexed alternative dispute resolution. *Journal of Contemporary Law*, 21, 1-19; Kakalik, J.S., Dunworth, T., Hill, L.A., McCaffrey, D., Oshiro, M., Pace, N.M., & Vaiana, M.E. (1995, December 31). *An evaluation of mediation and early neutral evaluation under the Civil Justice Reform Act*. The Institute for Civil Justice. RAND Corp.; Plapinger, E. & Stienstra, D. (1996). *ADR and Settlement in the Federal District Courts: A sourcebook for judges & lawyers*. Federal Judicial Center & CPR Institute for Dispute Resolution. Retrieved April 18, 2016, from [http://www.fjc.gov/public/pdf.nsf/lookup/adsrcbk.pdf/\\$File/adsrcbk.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/adsrcbk.pdf/$File/adsrcbk.pdf).

²⁶ Plapinger & Stienstra (1996), *ibid*.

²⁷ See Della Noce, D.J., Folger, J.P., & Antes, J.R. (2002). Assimilative, autonomous, or synergistic visions: How mediation programs in Florida address the dilemma of court connection. *Pepperdine, Dispute Resolution Law Journal*, 3:1, 11-38, 21-23. See also Press, S. (2011). Court-connected mediation and minorities: A report card." *Faculty Scholarship*. Paper 398, 819-851. Available at <https://open.mitchellhamline.edu/facsch/398/>; and Senft, L.P. & Savage, C.A. (2003). ADR in the courts: Progress, problems, and possibilities. *Pennsylvania State Law Review*, 108, 327-348.

²⁸ Welsh, N.A. (2001). The thinning vision of self-determination in court-connected mediation: The inevitable price of institutionalization. *Harvard Negotiation Review*, 6:1, 1-96. See also Senft & Savage. (2003), *ibid*. at 334-336.

²⁹ Mack, 2003, *supra* note 5.

observed to vary among practitioners, and, in some instances, even to fluctuate during the same mediation session.³⁰ At the very least, to the extent possible, efforts should be made to determine whether the same process is the referent of the same labels in ADR literature materials.³¹ Deviations from the common use of ADR nomenclature will be noted henceforth.

In the following discussion of the evidence for the impact of various types of ADR processes and various structural features of ADR programs on meeting goals, a foundation will be laid for the Trial Court's assessment of strategies that it might undertake to advance awareness, access, and utilization of court-connected ADR in the Massachusetts judicial system.

III. ADR and the goal of court efficiency: Enhancing the working of the court through increased efficiency of court operations

Federal and state courts welcomed the addition of ADR³² to adjudication – their dispute resolution practice – as a means of increasing their operational efficiency. Efficiency was identified as a Federal court goal that would be served by ADR in the Alternative Dispute Resolution Act of 1998.³³ The Act authorized the use of ADR (including mediation, early neutral evaluation, mini-trials, and voluntary arbitration) in federal district courts based upon Congressional findings that the increased efficiency in achieving settlements through ADR would shrink the court's caseload, thereby allowing for more effective management of the remaining cases. Efficiency was also a byword for ADR's value among state courts. For instance, Massachusetts court rules for ADR were developed, in part, to promote "efficient case management."³⁴ ADR was considered by California courts as a way to "alleviate the strain on [the] ...justice system" by reducing court filings and expeditiously settling cases.³⁵ And, in New Mexico, the view that court-

³⁰ Wissler, R.L. (2002). Court-connected mediation in general civil cases: What we know from empirical research. *Ohio State Journal of Dispute Resolution*, 17, 641-704.

³¹ The importance of consistency in terminology – in particular, being able to assume that the referent is the same for labels that are the same – was noted in an analysis of models of ADR delivery systems by Brazil (1999), *supra* note 15.

³² See Brazil, W.D. (2002). Court ADR 25 years after Pound: Have we found a better way? *Ohio State Journal on Dispute Resolution*, 18:1, 93-149, 94. Retrieved May 2, 2019, from <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1300&context=facpubs>, (arguing that "ADR is *not* about being better than; it is about being in addition to. ADR is *not* about subtracting; it is about adding").

³³ Alternative Dispute Resolution Act of 1998 (Public Law 105-315 s. 2) available at <https://www.govinfo.gov/content/pkg/PLAW-105publ315/pdf/PLAW-105publ315.pdf>

³⁴ Trial Court Standing Committee on Dispute Resolution (2005, June), *supra* note 8, preface.

³⁵ Folberg et al. (1992, Spring), *supra* note 18, at 347. Also, Hedeem (2005) observed that "courts promote [mediation] in the belief that, overall, settlement saves time and money and produces better results than trial. Courts value mediation as a method of screening out cases that do not need much judicial attention so that they can focus their limited resources on cases that need more. Indeed, courts generally see settlement as an absolute necessity to process all their cases, and judges often look to mediation as a way to relieve caseload pressures " (Hedeem, T. (2005). Coercion and self-determination in court-connected

annexed ADR programs could produce time and money savings for the court was reflected in an informal survey of 39 state court judges, who revealed that efficiency gains loomed large in their ADR referral decisions: quicker dispute settlement motivated 92% of judges, 84% wanted the court's calendar reduced, the potential for higher agreement compliance rates influenced 48%, and 24% sought assistance with their own caseload.³⁶ In general, "courts typically use ADR primarily as a case management tool, seeking more efficient and less costly ways of resolving disputes."³⁷

The measures used to gauge the value of court-connected ADR for improving the efficiency of court operations have included frequency of settlements or agreements, agreement compliance, the nature of the agreements achieved, time until case disposition or closing, costs to the court, time expended by judges or other court personnel on cases, quantity of trials, and amount of pre-trial activities (e.g., discovery, motions, dispositions, etc.). These efficiency measures are inter-related. Disputes that get settled through ADR leave the court's ambit of concern, exiting the court's calendar and purportedly freeing up the time that court staff and judges would have spent on intervening in the case or conducting a trial.³⁸ The exclusion of ADR decisions from the appeals process cements ADR's contribution to a smaller court caseload.³⁹ By one estimation, each small claims mediation agreement saves 30-45 minutes of a judge's time.⁴⁰ As a consequence of Maine's adoption of a rule mandating ADR (either mediation, early neutral evaluation, or non-binding arbitration) in its Superior Court, the number of cases requiring court involvement with their disposition reportedly fell by 40% when ADR settlements increased by 13%.⁴¹ The mixed results of other studies which do not show that the likelihood of agreement compliance and re-litigation is lower for mediation than adjudication – some studies found more compliance and less re-litigation after mediation while other studies found no significant difference⁴² – suggest that mediation agreement compliance has the potential to reduce re-litigation and so reduce the court's future caseload.⁴³

Evidence for the impact of ADR on court efficiency:

mediation: All mediations are voluntary, but some are more voluntary than others. *The Justice System Journal*, 26:3, 273-291, 273).

³⁶ Griller et al. (2011, April, 15), *supra* note 14.

³⁷ Griller et al. (2011, April 15), *ibid.*, at 65.

³⁸ "The real savings for the system [from ADR use] are in freeing up scarce judicial and clerical resources for tackling other work within the system." Dana (2005), *supra* note 25, at 381.

³⁹ Press (2011) *supra* note 27, at 823-825.

⁴⁰ Claim attributed to Goerdts (1992) by Charkoudian, L. (2012, August). *Cost-benefit/effectiveness analysis of alternative dispute resolution in Maryland: Literature review, data availability, and research design*. Administrative Office of the Courts, Maryland Judiciary.

⁴¹ Dana (2005), *supra* note 25, at 415.

⁴² Wissler, R.L. (1997). The effects of mandatory mediation: Empirical research on the experience of Small Claims and Common Pleas Courts. *Willamette Law Review*, 33, 565-604.

⁴³ Griller et al. (2011, April 15), *supra* note 14; Mack (2003), *supra* note 5.

ADR and efficiency in the federal judicial system:

An early evaluation, conducted by RAND in 1996, on the use of ADR during 1992-1993 by district courts in six federal districts (located in California, New York, Pennsylvania, Oklahoma, and Texas), considered the frequency of settlement, the time to disposition, the court's administration costs, and the monetary outcomes that were produced by both voluntary and mandatory mediation and early neutral evaluation of cases.⁴⁴ The likelihood of settlement through ADR ranged from 31% to 72% across the courts. Monetary outcomes were significantly more likely for ADR than non-ADR cases in three of four districts. Although no comparison between settlement rates for ADR cases and non-ADR cases was made in this RAND evaluation, the results of a 2009 study of 15,288 cases handled by the Department of Justice and filed in federal courts from 1995 to 1998 suggested that settlement was more likely through ADR (mostly mediation) than through litigation: the settlement rate for cases that participated in ADR was more than double the rate for cases not participating in ADR: 65% of 511 ADR cases were settled through ADR while 29% of 14,777 non-ADR cases that pursued standard litigation settled without ADR (by way of administrative settlements, consent orders, consent judgments, or non-monetary and monetary recovery settlements) or were otherwise resolved through dismissal, judgement, closing, or other actions.⁴⁵

Data about the relation between court-connected ADR and efficiency in court operations was also made available by individual federal courts. By 1995 in the Utah federal district court, 64% of mediated cases and 100% of arbitrated cases were resolved while the length of time from case filing to disposition averaged about three and one-half months for mediation and nine months for arbitration.⁴⁶ The Eastern District of New York District Court referred 306 cases to mediation during FY 2017, 78% were mediated and 64% of the referred cases settled.⁴⁷ During that same period, 98 eligible cases were referred to compulsory arbitration.⁴⁸ Disposition times at the federal district court of the Southern District of New York were shorter for ADR-settled cases than the alternative.⁴⁹ Case disposition occurred about 10 months after filing for cases settled via ADR, 17 months for all contract cases, and 14 months for all tort cases.⁵⁰ According to the RAND report, though, time from case filing to disposition did not

⁴⁴ Kakalik, et al. (1996) (noting that the infrequent use of mini-trials and summary jury trials and the limited number of courts using arbitration accounted for the omission of these ADR processes from the report), *supra* note 25.

⁴⁵ Bingham L.B., Nabatchi, T., Senger, J.M., & Jackman, M.S. (2009). Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes, *Ohio State Journal on Dispute Resolution*, 24:2, 225-264.

⁴⁶ Holbrook & Gray (1995), *supra* note 25.

⁴⁷ United States District Court, Eastern District of New York. *Alternative dispute resolution report, July 1, 2016 – June 30, 2017*. Retrieved May 5, 2019, from https://img.nyed.uscourts.gov/files/local_rules/2016-2017_ADR_Annual_Report.pdf

⁴⁸ United States District Court, Eastern District of New York, *ibid*.

⁴⁹ Stephenson (1987, June), *supra* note 18.

⁵⁰ Stephenson (1987, June), *ibid*.

significantly vary between ADR cases and non-ADR cases in federal courts in five districts, but was significantly longer by nearly three months in a sixth district. Anecdotal evidence suggested that the practice of assigning difficult cases to mediation accounted for the increased time in that one district.

The RAND finding about the impact of mediation and early neutral evaluation on the length of time to case disposition was roughly consistent with the mixed results from other studies about the effect of federal court arbitration on disposition time.⁵¹ One explanation for arbitration's variable influence on reducing delays appealed to differences in program design and implementation among federal courts, e.g., scheduling arbitration at different litigation stages. The possible influence of the timing of the ADR intervention on disposition times was suggested by descriptive data in the 2009 study of Department of Justice cases, which indicated that the average period of time between the ADR's entrance into the case to final disposition was shortest when ADR was brought into the case during the first 90-day period after filing. Design features were also featured in a study of voluntary and mandatory mediation in the federal district court in the Western District of Missouri.⁵² Cases were randomly assigned for automatic referral to early mediation, to procedures other than mediation, or to a choice between mediation or non-mediation. Case disposition time proved shortest for automatically referred mediated cases, but in the group with options, cases that chose to mediate took one month longer to case disposition than did cases that chose not to mediate, suggesting that differences in the referral procedure may have led to the differences in disposition times.⁵³

Court administrative costs per ADR case at the mediation and early neutral evaluation programs in federal district courts considered in the Rand report ranged from \$130 to \$490 in 1995 dollars (or \$209 to \$788 in 2017 dollars) depending on local circumstances.⁵⁴ ADR costs were contrasted to trial costs in an evaluation of ADR in the District Court of the Southern District of New York, which indicated that the \$490 average administrative cost of ADR in 1987 was one-third the \$1,326 cost of a trial.⁵⁵ In contrast, the cost to a North Carolina district court of closing a case through court-annexed arbitration did not significantly differ from the costs of case closings in a control group.⁵⁶

ADR and efficiency in state courts:

⁵¹ Noted by Keilitz, cited in Kakalik et al. (1996), *supra* note 21.

⁵² Lande, J. (2004). Commentary: Focusing on program design issues in future research on court-connected mediation. *Conflict Resolution Quarterly*, 22:1-2, 89-100.

⁵³ Lande (2004). *ibid*.

⁵⁴ Kakalik et al. (1995, December 31), *supra* note 25.

⁵⁵ Pointed out by Stephenson (1987, June), *supra* note 18.

⁵⁶ Bernstein, L. (1993). Understanding the limits of court-connected ADR: A critique of Federal court-annexed arbitration programs. *University of Pennsylvania Law Review*, 141: 6, 2169-2259.

Studies of court-connected mediation and neutral evaluation in state courts were reviewed by Wissler in 2004.⁵⁷ Mediation and neutral evaluation, compared in one study, did not differ on such efficiency measures as settlements produced or the amount of discovery, filed motions, or time to disposition. Considered on its own merits, though, neutral evaluation of general jurisdiction civil cases (viz., civil actions excepting small claims, domestic relations, and probate cases), which was examined in four comparison studies reviewed by Wissler (2004), resulted in settlement rates of 23% to 51%. According to three studies, savings in court costs were achieved through the settlement of cases in numbers equivalent to the caseload of one to two judges. On the other hand, any time and money saved from the elimination of settled ADR cases from the court's caseload may be offset by the expense of managing court-connected ADR.⁵⁸ As for party costs, although in Wissler's 2004 review one study found lower attorney fees in successfully mediated small claims cases than in litigated cases, three studies of general jurisdiction cases and one study of appellate cases found that attorney work hours, fees, or litigation costs failed to differentiate mediated and non-mediated cases.⁵⁹ Based on the results of one study, trials in neutral evaluation cases were "slightly less likely" than in non-neutral evaluation cases. No differences in disposition times was found between the neutral evaluation cases and a comparison group.⁶⁰

Unlike neutral evaluation which was usually conducted in general jurisdiction cases, mediation was used for both small claims and general jurisdiction civil cases as well as appellate cases. In studies reviewed by Wissler (2004), mediation of general jurisdiction cases led to settlement rates of 27% to 63%. A minimum 90% compliance rate characterized mediated general jurisdiction agreements in three studies, and, in one study, exceeded compliance with trial verdicts. Comparisons to non-mediated cases with respect to such efficiency measures as settlement rates, speed of case closing, amount of discovery actions or of motions were inconclusive since study results were either mixed or statistically non-significant. This review finding was in line with the mixed results yielded by studies of mediation, early neutral evaluation, and arbitration in general civil cases that compared the acceleration of case disposition through ADR with litigation.⁶¹ Variations in ADR referral and session scheduling were invoked to partially explain the variety of findings about the effect of ADR on the duration of time until case disposition.

⁵⁷ Wissler, R.L. (2004). The effectiveness of court-connected dispute resolution in civil cases. *Conflict Resolution Quarterly*, 22:1-2, 55-88.

⁵⁸ Yates, S. M. (2007). *Accessing justice through mediation: Pathways for poor and low-income disputants*. Chicago, IL: Center for Analysis of Alternative Dispute Resolution Systems. Retrieved March 15, 2016, from <http://poseidon01.ssrn.com/delivery.php?ID=198103020022122078088103012077070122042048077048056085078020004029082017117121082105061019106057060060051030094099070070117019023021012013031099069123007112124025048010023103127009094103072020120076113071086097005103085086002077114113079025085066003&EXT=pdf>

⁵⁹ Wissler (2004), *supra* note 57.

⁶⁰ Wissler (2004), *ibid.*, at 77.

⁶¹ Wissler, R.L. & Dauber, B. (2005). Leading horses to water: The impact of an ADR "confer and report" rule. *Justice System Journal*, 26:3, 253-272.

For appellate cases, according to Wissler (2004), agreements were 10% to 20% more likely in mediated cases than in non-mediated cases (found by studies that included a comparison group of non-mediated cases) and were achieved in 29% to 47% of mediated cases (found in 15 studies). Moreover, mediated cases took from one to three months less time to disposition than did non-mediated cases (found in five studies).

Settlement rates produced by small claims mediation conducted on the day of trial ranged from 47% to 78%, as per the majority of ten studies reviewed by Wissler (2004). The small claims agreements were more likely than adjudicated decisions to contain non-financial arrangements, e.g., installment plans, and to provide some money to plaintiffs when money was at issue. Compliance with mediated small claims agreements, considered in eight studies, ranged from 62% to 90%, which, according to most of the studies that involved a comparison group, tended to be higher than compliance with trial verdicts, though one study found no difference in compliance between groups. Information about efficiency measures, such as time to disposition and quantity of litigation activities, was not mentioned by Wissler, possibly because cases that failed to settle typically proceeded to trial on the same day.⁶² However, a study of a small claims mediation pilot in Maine, not reviewed by Wissler, determined that small claims mediation sessions (lasting an average 25.7 minutes) took more time than trials (which lasted 14.4 minutes on average).⁶³

Wissler's 2002 investigation into the effectiveness of court-connected mediation concerned general jurisdiction civil cases in nine Ohio courts, 1,060 of which were assigned to mediation while 683 were assigned to non-mediation.⁶⁴ Based on responses to questionnaires from participating mediators, parties, and attorneys, the study showed that 82% of mediation referrals led to mediation. In 98% of the cases, both sides had attorney representation. Mediation activities reported by mediators included: using techniques, such as reality testing, risk analysis, and asking questions, to help parties evaluate their case (in 89% of cases); providing an evaluation of the case's merits (31% of cases), assessing the case's value (66% of cases); suggesting settlement possibilities (28% of cases), and offering no opinion about the case (40% of cases). Full agreements were reached in 45% of the mediated cases, partial agreements were formed in 3%, and 41% reported making progress towards settlement. The narrowness of the difference between party positions proved to be the most influential factor for increasing the probability of settlement. Other important factors included attorney cooperation during mediation, mediator recommendation of a specific settlement, and mediator

⁶² "studies of mediation in small claims court generally find no shortening of time to disposition because the dispute system design generally provides for mediation to occur on the day of trial." Bingham et al. (2009), *supra* note 45, at 243.

⁶³ Dana, *supra* note 25.

⁶⁴ Wissler (2002), *supra* note 30.

assessment of the case's value. A large majority of the mediation agreements (82%) provided for monetary outcomes. Non-monetary provisions included repairs, return of property, agreement to perform an action (e.g., pay a bill, issue a letter of apology, relinquish other claims), etc. Time from case filing to disposition or the number of motions did not significantly differentiate mediated from non-mediated cases.

When mediation was contrasted to adjudication in Wissler's 1995 study of small claims cases at courts in Greater Boston, the nature of agreements or awards, but not compliance with the agreements or awards, distinguished mediation from adjudication.⁶⁵ Mediation participation was either mandatory or voluntary depending upon the court. Out of the 221 cases that were studied, 96 cases went to trial and were not mediated while the 125 cases that were mediated included 72 cases that mediated successfully by reaching agreement and 53 unsuccessfully mediated cases that proceeded to trial. The type of entry into mediation – whether mandatory or voluntary – had no significant effect on the probability of settlement. Provisions for non-monetary conditions, payment schedules, and immediate payment (partial or complete) were significantly more frequent in mediated agreements than in adjudication decisions. In contrast to other studies that showed greater compliance with mediated small claims agreements than with adjudication, this 1995 study found that the greater probability of compliance with mediation than with adjudication outcomes was not statistically significant at the .05 level of significance. The degree of compliance was significantly related to the amount of the monetary outcome, the size of outcome relative to the amount claimed, and to the provision of a payment schedule. "These data suggest that compliance may be affected more by the nature of the outcome (and by the ability to pay) than by characteristics of the dispute resolution process."⁶⁶

Over the years, various state courts have published data for some of the efficiency measures. In 2017, across the New Mexico state courts that offered mediation, nearly 32% of answered general civil actions were resolved through mediation agreements.⁶⁷ The 92% compliance rate that applied to 64% of the mediated cases was 50 percentage points higher than for non-mediated cases. Disposition times in New Mexico's Magistrate Courts (courts of limited jurisdiction) tended to be shorter for mediated cases (85 days) than for cases that resolved through judgment (165 days).⁶⁸ Court-annexed arbitration, available in two New Mexico state districts, resolved monetary claims by issuing non-binding decisions about awards, which were appealable

⁶⁵ Wissler, R.L. (1995). Mediation and adjudication in the Small Claims Court: The effects of process and case characteristics. *Law & Society Review*, 29:2, 323-358.

⁶⁶ Wissler (1995), *ibid.*, at 349-350.

⁶⁷ Statewide Alternative Dispute Resolution Commission. (2017). *Annual report to the New Mexico Supreme Court*, at 4. Retrieved May 5, 2019, from https://adr.nmcourts.gov/uploads/FileLinks/d0bcba07d2b249d491514dbba18b67a5/2017_ADR_Commission_Annual_Report.pdf

⁶⁸ Statewide Alternative Dispute Resolution Commission. (2017), *ibid.*

on pain of penalty in the event of loss by the appellant.⁶⁹ As of 2011, at least 87% of arbitrated decisions were not appealed.⁷⁰

In a 2005 report on ADR in Maine's courts, evidence that court-connected mediation, neutral evaluation and non-binding arbitration produced settlements and avoided further judicial intervention was furnished by a six-month study of the 2002 implementation of mandatory ADR in Maine's Superior Court, which allowed parties to choose between mediation, early neutral evaluation, or non-binding arbitration.⁷¹ The study found that out of 509 cases, mediation was the most popular choice in 490 cases, early neutral evaluation was chosen in 13 cases, and six cases opted for non-binding arbitration. Settlements occurred in 41% of the mediated cases, 15% of cases involving early neutral evaluation, and 67% of arbitrated cases. Moreover, the time from scheduling order to resolution dropped by an average of 35% – from 402 days before the rule to 263 days afterwards – since adoption of the mandatory ADR rule was implemented.⁷²

Mediation and settlement conferences were both available to resolve civil actions in Maryland's judicial system.⁷³ In a study of the impact of using either type of ADR (at least 80% used mediation) in the day-of-trial ADR program for District Court civil cases, ADR cases were compared to a control group of non-ADR cases. Based on 461 cases, 53% of the ADR cases reached agreement while 16% of the control cases reached agreement on their own without ADR. ADR use increased the likelihood that parties reported that issues were settled. Moreover, parties who resolved their case through ADR were significantly less likely to return to court to enforce their agreement than were parties whose cases were resolved by verdict.⁷⁴

Michigan circuit courts primarily used mediation and case evaluation to resolve civil cases concerning money.⁷⁵ Whereas court-connected mediation in Michigan courts comported with the common understanding of mediation, case evaluation was unique to Michigan, resembling nothing so much as court-connected arbitration.⁷⁶ Case

⁶⁹ Griller et al. (2011, April 15), *supra* note 14.

⁷⁰ Griller et al. (2011, April 15), *ibid*.

⁷¹ Dana (2005), *supra* note 25.

⁷² Dana (2005), *ibid*.

⁷³ Charkoudian, L. (2016, February). *Impact of alternative dispute resolution on responsibility, empowerment, resolution, and satisfaction with the judiciary: Comparison of short- and long-term outcomes in District Court civil cases*. State Justice Institute, Administrative Office of the Courts, Maryland Judiciary.

⁷⁴ Charkoudian (2016, February), *ibid*.

⁷⁵ Campbell, M.D. & Pizzuti, S.L.. (2018, May 1). State Court Administrative Office, Michigan Supreme Court. *Case evaluation and mediation in Michigan Circuit Courts: A follow-up study*. Retrieved May 3, 2019, from

<https://courts.michigan.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/2018%20Mediation%20and%20Case%20Evaluation%20Study.pdf>

⁷⁶ Consider: "Case evaluation is a process through which a panel of three attorneys, appointed by a court and not involved in the dispute, hears issues specified by the parties and then renders a monetary

evaluation involved specifying an award amount that parties could then use as a basis for resolving their dispute. The award amount reflected the economic value of the case as determined by a panel of attorneys after hearing both sides. Trial was available upon non-acceptance of the award, but penalties were imposed upon the rejecting party if trial results did not exceed the award. Case evaluation was mandated for all tort claims while non-tort claims could be ordered by the court to either case evaluation or mediation. A 2018 review of 358 civil cases in three of Michigan's circuit courts revealed that case evaluation was conducted for 32% of the 358 cases, 14% were mediated, and 33% were neither mediated nor evaluated. Cases were resolved through settlement/consent judgment in 82% of the cases using only case evaluation, 82% of mediated cases, and 57% of cases that involved neither of these ADR processes. The introduction of either ADR process into a case increased the time to disposition, with disposition time greatest for case evaluation. Cases involving neither ADR process took an average of 309 days to resolve while mediated cases averaged 377 days and case evaluation prolonged disposition time to 489 days. Most surveyed judges and attorneys involved in the 358 cases indicated that case evaluation and mediation were most likely to have a positive effect on disposition time after discovery was completed.⁷⁷

As a result of early referrals to mediation during 2000-2001, efficiency measures showed some improvement at five California Superior Courts that operated early mediation referral pilot programs.⁷⁸ Nearly 61% of the 7,900 limited and unlimited civil cases that were referred to mediation within a 90-day period after case filing (instead of the usual 120-150 days) and participated in mediation were resolved. By settling cases through mediation, 24% to 30% fewer cases went to trial at two courts, thereby lowering trial rates and potentially saving court time by an estimated 520 trial days per year at one court and 670 trial days at the other court. Furthermore, at four Superior Courts, motions decreased by 18% to 48% while other pretrial hearings declined by 11% to 32%.⁷⁹

The upshot of the research into the impact of court-connected ADR on court efficiency is that mediation, neutral evaluation, arbitration, and settlement conferences can produce settlements and thereby save the time that the court would otherwise be required to spend if the cases had continued through the litigation process. The mixed results from comparisons between ADR and non-ADR cases regarding such efficiency measures as compliance, the quantity of discovery actions or motions, the speed of case

evaluation of the case.Penalties may be attached for not accepting the award if the rejecting party does not improve upon a trial verdict by 10 percent over the award, and the other party(ies) accepted the award" and "Michigan's case evaluation process appears to have no direct counterpart elsewhere. The most similar ADR process is non-binding arbitration..." Campbell & Pizzuti (2018, May 1), *ibid.*, at 9, 11.

⁷⁷ Campbell & Pizzuti (2018, May 1), *ibid.*

⁷⁸ Judicial Council of California. (2004, February, 27). *Evaluation of the early mediation pilot programs*. Administrative Office of the Courts. Retrieved May 5, 2019, from <http://www.courts.ca.gov/documents/empprept.pdf>

⁷⁹ Judicial Council of California. (2004, February, 27), *ibid.*

closings, and cost savings to parties and court, suggests that although successful ADR has the potential to enhance court efficiency more than the alternative, it is unclear that its potential will probably be realized.

IV. Utilization of court-connected ADR:

Evidence of the utilization of court-connected ADR:

Unless court-connected ADR were actually utilized, it would have minimal, if any, influence on the efficiency of court operations.⁸⁰ By 2016, courts in all US states, Washington, DC, Puerto Rico and in the federal system at district and appellate levels provided ADR options to litigants, including arbitration, mediation, judicial settlement conferences, neutral evaluation, mini-trials, and summary jury trials, among others.⁸¹ Nevertheless, the widespread availability of court-connected ADR belies the extent of its use by litigants. Published information about the extent of court use of ADR mostly consists of data about the quantity of ADR referrals and cases involving ADR that are tied to particular courts at a particular time. Thus, by 1999 in courts across Colorado, more than 9,500 cases per year were estimated to have used (mandatory or case-by-case referred) ADR.⁸² Florida's state court system – celebrated for its well-entrenched court-connected ADR programs⁸³ – referred 103,494 cases to mediation or arbitration in 2006-2007. The year before, 73% of the 99,954 cases ordered by Florida courts to ADR were mediated (i.e., 72,844 mediations).⁸⁴ As of 2011, more than 4,500 child abuse and neglect cases were referred to mediation in Florida over a ten-year period, at an average of 450 cases each year.⁸⁵ More recently, the US District Court of the Eastern District of New York reported that during the 2017 fiscal year, 306 cases were referred to mediation with 78% actually engaging in mediation while compulsory court-annexed arbitration was ordered for 98 civil cases.⁸⁶ More current statistics about ADR utilization collected by the Massachusetts judicial system indicated that in FY 2016 an estimated 55,000 referrals were made by the seven Massachusetts Court Departments to ADR, including mediation, dispute intervention, conciliation, and summary jury trials.⁸⁷ Dispute intervention and conciliation are ADR variants special to Massachusetts courts. Dispute intervention involved court employees meeting with parties and their attorneys to identify issues, discuss settlement options, and provide relevant information and

⁸⁰ Wissler (2002), *supra* note 30.

⁸¹ Eisenberg, D.T. (2016). What we know and need to know about court-annexed dispute resolution. *South Carolina Law Review*, 67, 245-265.

⁸² Erickson, W.H. & Savage, C.A. (1999). ADR in Colorado, *Dispute Resolution Journal*, 54:3, 60-64.

⁸³ See Folberg et al., (1992, Spring), describing Florida as “the state that has institutionalized ADR in its courts to the greatest degree”) *supra* note 18, at 329.

⁸⁴ Commission on Trial Court Performance & Accountability. (2008, August). Supreme Court of Florida *Recommendations for alternative dispute resolution services in Florida's Trial Courts*. Tallahassee, FL.

⁸⁵ Griller et al. (2011, April, 15), *supra* note 14.

⁸⁶ United States District Court, Eastern District of New York, *supra* note 47.

⁸⁷ Based on unpublished internal court records.

recommendations to the court whereas conciliation was conducted by a neutral attorney who met with attorneys and pro se parties to elucidate issues, evaluate the strength of the case, promote settlement, and, when appropriate, discuss litigation moves.⁸⁸ An estimated 53,000 filed cases used Massachusetts court-connected ADR, with settlement rates ranging from 42% to 84% depending on the Department.⁸⁹

Ascertaining the extent of ADR utilization requires contextualizing referral and ADR numbers, which in turn entails determining the proportion of cases involved with court-connected ADR relative to the totality of possible cases. Yet such information is in short supply. Some numbers about utilization rates have emerged from studies of court-connected ADR pilots. For example, an ADR pilot conducted in Maine's Superior Court from 1988 to 1990 resulted in 15% of non-domestic civil filings in the two participating counties involving ADR.⁹⁰ Higher utilization rates of 32% were found in a California pilot that involved both mandatory and voluntary ADR.⁹¹ A 2004 evaluation of a pilot project in early mediation at the Superior Courts in five California counties found that out of the more than 25,000 cases that were filed during 2000-2001 and were eligible for early mediation referral, nearly 32% or about 7,900 cases participated in early mediation.⁹² In New Mexico, a 32% mediation settlement rate was achieved in 2017 for all answered general jurisdiction civil complaints in courts that had a mediation program.⁹³ Based on its data collection process, the Massachusetts Probate & Family Court determined that 36% of eligible cases used its ADR services in FY 2016 and in FY 2017.⁹⁴ In other court systems, utilization data was not collected. Maryland's judicial system, a leader in court-connected ADR,⁹⁵ did not "track the actual mediation referrals based upon the total number possible referrals" due, in part, to difficulties with identifying possible cases.⁹⁶

The scope of ADR impact on the court system is limited by the quantity of cases available for ADR and by the frequency of ADR use. Statutory regulations, court rules and practices, and ADR program protocols exclude certain types of cases from ADR. Examples of excluded cases are those that concern petitions for habeas corpus or other prisoner claims, social security, declaratory relief, taxes, guns, personal liability, and protection of rights.⁹⁷ Eligibility for referral to court-annexed arbitration usually involves monetary requirements.⁹⁸ Thus, California statutes require court-annexed arbitration of

⁸⁸ Trial Court Standing Committee on Dispute Resolution, *supra* note 8.

⁸⁹ Unpublished internal Massachusetts court records.

⁹⁰ Dana (2005), *supra* note 25. Also see Judicial Council of California. (2004, February, 27), *supra* note 78.

⁹¹ Judicial Council of California. (2004, February, 27), *ibid*.

⁹² Judicial Council of California. (2004, February, 27), *ibid*.

⁹³ Statewide Alternative Dispute Resolution Commission. (2017), *supra* note 67.

⁹⁴ Unpublished internal Massachusetts court records.

⁹⁵ Eisenberg (2016), *supra* note 81.

⁹⁶ Guerin, T.T. (2014, April). *Alternative dispute resolution landscape: An overview of ADR in the Maryland court system*, at 51. Maryland Administrative Office of the Courts (AOC). Retrieved April 29, 2019, from <https://www.courts.state.md.us/sites/default/files/import/courtoperations/pdfs/adrlandscape.pdf>

⁹⁷ Wissler (1997), *supra* note 42; Charkoudian (2016, February), *supra* note 73.

⁹⁸ Bernstein (1993), *supra* note 56.

civil claims under \$50,000 in larger counties and authorize such arbitration in smaller counties.⁹⁹ Pursuant to local rules, the federal district court in the Eastern District of New York refers non-exempt cases that claim a maximum of \$150,000 in money damages to compulsory arbitration.¹⁰⁰ Certain court orders, like restraining orders, may block the use of ADR processes that rely on party participation (e.g., mediation).¹⁰¹ Additionally, the personal circumstances of parties – competency challenges, mental illness, power imbalance, fear of violence – may foreclose ADR participation.¹⁰²

Declining trial numbers constrain the impact that ADR can have on court efficiency. Civil trials have purportedly dwindled over the years.¹⁰³ An estimate that put the proportion of state court cases that advanced to trial below ten percent¹⁰⁴ was in accord with reports from California state court judges and administrators that 90% to 98% of cases avoid trial.¹⁰⁵ Given the small number of cases on a trial path, ADR's contribution to increasing court efficiency through fewer trials would be limited. ADR's impact on court operations would be further lessened by low levels of ADR participation.

Increasing ADR utilization:

The voluntary use of ADR has been deemed anemic.¹⁰⁶ Although mediation is the most available ADR process in courts, voluntary mediation is underutilized, even when service fees are small or non-existent.¹⁰⁷ The limited use of the ADR options of mediation, arbitration, and facilitation at California state courts and the need for greater ADR use were widely recognized, not only by the California bench, but also by the state's bar and legislature.¹⁰⁸ Infrequent use of ADR curtails ADR's effect on the efficiency of court operations. Thus, the negligible impact of an ADR pilot on the dockets of two participating counties of Maine's Superior Court was attributed to the low rate of ADR utilization (viz., 15%), among other factors.¹⁰⁹

Apart from institutional barriers (e.g., rule-based exemptions) and disqualifying conditions (e.g., party incompetency, risk of violence), the attitudes of principal ADR actors – judges and other court personnel, parties, and attorneys – factor into depressed ADR use. Judges' reluctance to encourage utilization of ADR reflected, in part,

⁹⁹ Folberg et al. (1992, Spring), *supra* note 18.

¹⁰⁰ United States District Court, Eastern District of New York, *supra* note 47.

¹⁰¹ Mack (2003), *supra* note 5.

¹⁰² Mack (2003), *ibid.*; Boyarin (2012), *supra* note 13.

¹⁰³ Folberg et al. (1992, Spring), *supra* note 18, at 347; Press (2011), *supra* note 27.

¹⁰⁴ Press (2011), *ibid.*, at 838.

¹⁰⁵ Folberg et al. (1992, Spring), *supra* note 18.

¹⁰⁶ Bernstein (1993), *supra* note 56.

¹⁰⁷ Wissler (1997), *supra* note 42; Hedeon (2005), *supra* note 35.

¹⁰⁸ Folberg et al. (1992, Spring), *supra* note 18.

¹⁰⁹ See Dana, (2005), *supra* note 25, at 369.

their obligation to protect rights and contribute to knowledge about the application and interpretation of the law, their interest in forestalling the perception of “second-rate” justice, and their concern about adding to litigants’ legal costs.¹¹⁰ Often judge’s aloofness arose from a lack of familiarity with ADR.¹¹¹ Parties and attorneys eschewed ADR in order to, among other things, avoid signaling weakness, obtain vindication and their “day in court,” address logistical matters (e.g., continue discovery), and persist with familiar rather than risk unfamiliar proceedings.¹¹²

The extent of parties’ knowledge – or lack thereof – about court-connected ADR was explored in Shestowsky’s 2017 study of litigants’ ability to correctly identify the ADR options that were offered by the court handling their case.¹¹³ Litigants in Utah, California, and Oregon state courts that provided court-connected arbitration and mediation had access to court information about their court’s ADR options through on-line material about the ADR programs along with a list of approved mediators and arbitrators. Attorney-client discussion of ADR was not required by any of the courts. In surveys completed soon after case filing, nearly one-fourth of 221 ADR-eligible litigants correctly indicated whether mediation (24%) or arbitration (27%) was available in their court. The remaining surveyed litigants either denied knowing about (approximately 50%) or wrongly denied the existence of the court’s ADR offerings (around 25%). Only about 15% of the litigants were accurate about the availability of both ADR programs in their court. Representation by a lawyer was not a significant factor influencing litigants’ knowledge about their court’s ADR options. Even when surveyed litigants were involved in courts that mandated ADR unless parties expressly opted out in writing (the Utah and Oregon courts), only a minority were knowledgeable about the existence of the ADR at their court.¹¹⁴

Increasing ADR utilization through education and informational materials:

Initiatives to remedy the deficiency in ADR awareness shared by judges and other court personnel, parties, and attorneys have been proposed and/or instituted in order to promote greater utilization of court-connected ADR. State court judges in California, whether surveyed (125 judges) or interviewed (38 judges), agreed that education about ADR was key to ADR utilization – education that would reach the public, litigants, attorneys, and judges.¹¹⁵ To that end, a number of judges recommended imposing requirements – on litigants to attend in-person or video

¹¹⁰ Brazil (2002), *supra* note 32; Kakalik et al. (1996), *supra* note 25; Mack (2003), *supra* note 5; Senft & Savage (2003), *supra* note 27; Wissler (1997), *supra* note 42.

¹¹¹ Griller et al. (2011, Aril 15), *supra* note 14.

¹¹² Kakalik et al. (1996), *supra* note 25; Senft & Savage (2003), *supra* note 27.

¹¹³ Shestowsky, D. (2017, Spring). When ignorance is not bliss: An empirical study of litigants’ awareness of court-sponsored alternative dispute resolution programs. *Harvard Negotiation Law Review*, 22, 189-239. Retrieved February 25, 2019, from http://www.hnrlr.org/wp-content/uploads/HNR201_crop-2.pdf

¹¹⁴ Shestowsky, D. (2017, Spring), *ibid*.

¹¹⁵ Folberg et al. (1992, Spring), *supra* note 18.

presentations about ADR provided by a judge, court staff, or ADR provider; on attorneys to discuss and contrast ADR and litigation with clients; and on the court to mandate participation in ADR before or soon after filing. For themselves, judges unanimously rejected educational mandates, favoring access to educational opportunities, such as courses or conversations with peers, instead.¹¹⁶ Majorities of informally surveyed judges (39 respondents), court administrators (50 respondents), and neutrals and ADR providers (162 respondents) in New Mexico largely recognized the need for greater awareness of ADR on the part of the public.¹¹⁷ To raise public (and litigant) awareness and thereby increase the use of court-annexed ADR, administrators undertook to supply ADR informational materials with court filings, distribute brochures, and make presentations to community groups. In addition to the public education strategies employed by court administrators, neutrals and providers in New Mexico recommended including community networking and self-help centers – like those in other state courts – along with expanding educational efforts to judges and attorneys through trainings with the court and in-person discussions with peers or ADR professionals.¹¹⁸

To reach a broader swathe of the community, including pro se parties, commentators have advised improving the contents of and easing access to all forms of communication. Accordingly, commentators have urged that communications about ADR be couched in everyday language and translated when needed to convey information that not only describes the available ADR processes along with the procedures and forms needed to access ADR, but also distinguishes the different ADR processes from one another and from adjudication.¹¹⁹ Informational material about ADR should be distributed by the court to parties, especially pro se parties, upon initial court contact, and plaintiffs should send ADR material to defendants together with the complaint.¹²⁰ Electronic access to written informational materials and forms as well as to spoken/visual presentations and videos should be provided through a user-friendly court web-site that also contains links to sites with information about specific ADR programs.¹²¹

The above strategies to raise awareness and increase ADR use may appeal to common sense, but – apart from compelling attorney discussion about ADR, judicial intervention, and mandating ADR participation – their effectiveness has yet to be tested. Because of the very low open rate of 3.42% for direct mail, reliance upon mailed materials, no matter how well crafted, to affect the recipient's awareness might well be misplaced.¹²² A divorce mediation study found that over one-third (38%) of pro se

¹¹⁶ Folberg et al. (1992, Spring), *ibid.*

¹¹⁷ Griller et al. (2011, April 15), *supra* note 14.

¹¹⁸ Griller et al. (2011, April 15), *ibid.*

¹¹⁹ Folberg et al (1992, Spring), *supra* note 18; Kulp (2013), *supra* note 15; Shestowsky (2017, Spring), *supra* note 113.

¹²⁰ Folberg et al (1992, Spring), *ibid.*

¹²¹ Griller et al., (2011, April 15), *supra* note 14.

¹²² Kulp (2013), *supra* note 15.

parties prepared for mediation by reading court literature, nearly one-fourth (24%) consulted court personnel, and one-fifth (20%) investigated mediation on their own.¹²³ Additionally, even though 84% of the US population uses the internet, the importance of electronic access to ADR information might be overstated for vulnerable populations since on-line information has been shown to reach only 58% of senior citizens, 74% of low-income households (earning less than \$30,000 annually), and 54% of disabled adults.¹²⁴ As illustrated in the aforementioned 2017 study, access to ADR information on court web-sites did not translate into widespread litigant awareness of the ADR provided in Utah, California, and Oregon state courts.¹²⁵ Further research into the impact of these strategies on ADR awareness and use is needed.

Increasing ADR utilization through attorney influence:

Given their function to guide parties and conduct the case, attorneys can be a critical conduit to increasing utilization of court-connected ADR, despite evidence that attorney-client discussions about ADR are uncommon.¹²⁶ Factors that might prompt attorneys to recommend ADR to clients, such as attorneys' ADR education, experience, and mandated discussions – were examined in two research studies.

In 2002, Wissler's 2002 study investigated the influence of education and experience on attorneys' advising ADR.¹²⁷ Responses to randomly distributed questionnaires from 1,299 Ohio attorneys indicated that arbitration was the most frequently recommended ADR process, followed by mediation, and then by neutral evaluation. Among the three most influential factors affecting the probability that attorneys would counsel clients to try ADR, attorney experience with using ADR in a case was the most impactful. Attorney practice as a neutral was the second-most influential factor, with attendance in a continuing legal education course in dispute resolution the least influential of the three. These results, which suggest that increasing attorneys' experience with ADR in their practice would be instrumental in promoting ADR use, may support using mandatory ADR as a way to increase attorneys' ADR experience.¹²⁸

In a 2005 study, Wissler and Dauber investigated the effectiveness of compelling attorney communication about ADR.¹²⁹ To motivate attorneys to learn more about and

¹²³ Wissler, R.L. (2010). Representation in mediation: What we know from empirical research. *Fordham Urban Law Journal*, 37, 419-471.

¹²⁴ Shestowsky (2017, Spring), *supra* note 113.

¹²⁵ Shestowsky (2017, Spring), *ibid*.

¹²⁶ Wissler & Dauber (2005), *supra* note 61; see also Wissler (2010) (citing a domestic relations study that found that a minority of 44% of parties discussed mediating with their attorney), *supra* note 123.

¹²⁷ Wissler, R. (2002). When does familiarity breed content? A study of the role of different forms of ADR education and experience in attorneys' ADR recommendations. *Pepperdine Dispute Resolution Law Journal*, 199-239. Available at <https://ssrn.com/abstract=1723345>

¹²⁸ Wissler (2002) When does familiarity...., *ibid*.

¹²⁹ Wissler & Dauber (2005), *supra* note 61.

use ADR, confer-and-report rules were adopted in at least five states – Arizona, Alaska, Indiana, Minnesota, and Massachusetts (both Massachusetts’ state courts and federal district court).¹³⁰ In particular, Wissler and Dauber examined the effect of an Arizona confer-and-report rule on the incidence of early attorney discussions about ADR use and of early settlements. The rule required lawyers to confer with one another early in the litigation process about using ADR to settle the case, report their discussion to the court, and confer with the judge in the event of disagreement. Attorneys – working at courts in two counties where court-connected ADR largely consisted of compulsory, nonbinding arbitration and voluntary settlement conferences – were surveyed about their activities before (412 attorneys) and after (333 attorneys) the rule was implemented. Minorities of attorneys complied with the reporting requirement – 50% of attorneys in one county and 21% of attorneys in the other county filed the ADR report in 75% of their cases. Compliance was significantly higher in the county where the reporting requirement was somewhat enforced – sanctions were threatened but not imposed – compared to the other county where compliance was neither monitored nor enforced.

Comparing attorney responses before with their responses after rule implementation revealed that there were no significant changes in the frequency of early ADR conferences, in attorneys’ self-described ability to explain ADR, in attorneys’ view that proposing ADR was a sign of weakness, nor in the incidence of early settlements. Discovery was the most important factor affecting the occurrence of early discussions. Yet significant changes in the frequency of ADR discussions and ADR use did occur after the institution of the rule. Attorney discussions with clients and with opposing counsel about ADR increased as did the use of voluntary ADR, just not during the early phase of litigation. Although contact with judges occurred late in the litigation process, judges had the strongest influence on ADR discussions: the frequency of ADR discussions between attorneys was related to the frequency with which judges suggested ADR.¹³¹

If the Wissler-Dauber research is any guide, accommodating discovery needs, rule enforcement, and judicial encouragement of ADR might reinforce the influence of confer-and-report rules on promoting attorney communication about ADR with parties as well as actual use of ADR. It should be noted that the application of confer-and-report rules may be cabined by restrictions on the use of ADR in certain types of cases. Exemptions from the reporting requirement of Massachusetts state court rule (Uniform Dispute Resolution Rule 5), which requires attorneys to discuss ADR with their clients and report their discussion to the court, are granted by some of the state’s courts.¹³² Thus, while District Court exempts abuse cases from Rule 5 reporting, no such reporting exemptions are available in the Housing Court.

¹³⁰ Folberg et al. (1992, Spring) *supra* note 18; Wissler (1997), *supra* note 42; Wissler & Dauber (2005), *ibid.*

¹³¹ Wissler & Dauber (2005), *ibid.*

¹³² Trial Court Standing Committee on Dispute Resolution (n.d.), *supra* note 8.

Increasing ADR utilization through court encouragement:

Judicial impact on ADR awareness and utilization is manifested, not only through referrals and court orders, but also through recommendations and the sharing of information. The research on the connection of confer-and-report rules to attorneys' ADR discussion and use provides evidence for the power of judicial intervention to promote court-connected ADR. Moreover, attorneys in New Mexico reported in informal surveys that they became acquainted with court-connected ADR mainly through the actions of judges, such as orders and referrals, or through interactions with judges and court staff.¹³³ Courts can be a primary source of ADR information for parties too. In 164 post-mediation surveys during FY 2018, a majority of separating or divorcing parent litigants with child-related disputes learned about a parenting mediation program from the Massachusetts Probate and Family Court – judges were the source for 50% of parents and court staff informed 28% of parents.¹³⁴ Based on the belief that people are more open to information when the source is “trusted and respected,” judges – and court staff – appear to be in an excellent position to effectively educate litigants and attorneys about court-annexed ADR.¹³⁵ “Litigants and lawyers may be more willing to take the information seriously if it comes from a judge directly.”¹³⁶

Relying on judges to convey information about ADR, however, has its drawbacks.¹³⁷ Judges may not be broadly knowledgeable about all the available ADR options. Only consider – surveyed/interviewed California state court judges reported having greater familiarity with settlement conferences and arbitration, and half or more of these judges described themselves as unfamiliar or slightly familiar with mediation, neutral evaluation, summary jury trials, and mini-trials. Because contact with the judge typically occurs late in litigation, early use of ADR to settle a case may be precluded. Adding educational responsibilities to the judge's workload may be an incursion on the judge's expensive and limited time. When educational duties are allocated to court staff, court resources are burdened. Furthermore, some judges are wary of encroaching on the attorney-client relationship by undertaking an active role in disseminating ADR information – a concern articulated by 30% of interviewed/surveyed California judges. The proposal that judges continue to be an important contributor to greater awareness

¹³³ Griller et al. (2011, April 15), *supra* note 14.

¹³⁴ Massachusetts Office of Public Collaboration (2018, August 1). *Massachusetts Office of Public Collaboration Parent Mediation Program: Fiscal Year 2018 evaluation report*. Boston, MA: Massachusetts Office of Public Collaboration, University of Massachusetts Boston. Retrieved May 29, 2019, from https://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1021&context=mopc_pubs

¹³⁵ Folberg et al., (1992, Spring), *supra* note 18, at 382.

¹³⁶ Shestowsky, (2017, Spring), *supra* note 113, at 227; see also Kulp (2013) (predicting greater receptivity with “personal contact and encouragement from the court”), *supra* note 15, at 382.

¹³⁷ Pointed out and discussed by Folberg et al. (1992, Spring), *supra* note 18.

of ADR but not the “educator of first resort”¹³⁸ may be a way to gain value from judicial intervention for ADR awareness and use while offsetting any problems that might arise.

The impact of mandatory and voluntary ADR on ADR utilization:

Mandating ADR participation is routinely proposed to solve the problem of low ADR utilization. Mandatory referrals to ADR were credited with raising public awareness of non-litigation options for dispute resolution.¹³⁹ To increase awareness and demand for ADR services, a number of surveyed California state judges advised authorizing mandatory ADR early in the litigation process.¹⁴⁰ Mandatory ADR has been presented as a way to furnish attorneys with ADR experience, which research has shown was a major factor propelling attorneys to recommend ADR to clients.¹⁴¹ Moreover, by expanding participation in ADR, mandatory ADR was expected to enlarge access to opportunities for greater efficiency in courts and for ADR benefits for litigants.¹⁴² For instance, when mandatory court-connected arbitration was piloted in three federal district courts in 1978, it was touted as a means of expanding access to the court system while expediting dispute resolution at a lower cost.¹⁴³ The Las Vegas Justice Court’s switch from a voluntary to a mandatory mediation model was justified by anticipated increases in party satisfaction and court efficiency.¹⁴⁴ Furthermore, ADR benefits for parties were cited by informally surveyed New Mexico attorneys as a reason for using the mediation.¹⁴⁵ Ohio common pleas courts listed the advantages of mandatory mediation that accrue to parties (high levels of satisfaction and settlements, lower party costs) as well as to courts (increased efficiency, more cost-effective administration).¹⁴⁶ Consequently, to date, entry into court-connected ADR has been compelled or left to the choice of parties depending upon statutes, regulations, court rules, or the judge’s discretion.

Across courts, mandatory participation in ADR has been applied to an array of case types, among them “small claims and domestic relations matters; misdemeanors and other criminal matters between related people; truancy and delinquency problems; farmer-creditor disputes; specific categories of civil litigation, such as consumer disputes and medical malpractice; and community-wide civil rights and environmental or public resource disputes,”¹⁴⁷ and workers’ compensation.¹⁴⁸ Non-binding court-annexed arbitration of claims for money damages under a specified amount are referred to

¹³⁸ Folberg et al. (1992, Spring), *ibid.*, at 386. See also Shestowsky (2017, Spring), *supra* note 113.

¹³⁹ Senft & Savage (2003), *supra* note 27.

¹⁴⁰ Folberg et al., (xxx), *supra* note 18.

¹⁴¹ Wissler (2002), Court-connected mediation..., *supra* note 30.

¹⁴² Wissler (1997), *supra* note 42; Shestowsky, (2017, Spring), *supra* note 113.

¹⁴³ Bernstein (1993), *supra* note 56.

¹⁴⁴ Cited by Kulp (2013), *supra* note 15.

¹⁴⁵ Griller et al (2011, April 15), *supra* note 14.

¹⁴⁶ Cited by Hedeem, (2005), *supra* note 35, at 276.

¹⁴⁷ Wissler (1997), *supra* note 42, at 571.

¹⁴⁸ Erickson & Savage (1999, August), *supra* note 82.

mandatory, non-binding court-annexed arbitration in certain federal courts, with awards rejected by parties between 46% to 74% of the time.¹⁴⁹

Evidence has demonstrated growth in ADR use through mandatory ADR. A comparison of the proportion of civil cases that proceeded to ADR at two federal district courts found that percentages were higher for mandatory (10% at the Northern District of Ohio court) than for voluntary referrals (4.5% at the District of Utah court).¹⁵⁰ The higher referral and utilization rates associated with mandated ADR processes compared to voluntary ADR processes were also exhibited in Michigan circuit court cases. Civil tort cases claiming more than \$25,000 were statutorily required to be ordered for Michigan's version of case evaluation (while case evaluation or mediation could be ordered for non-tort civil cases at the judge's discretion).¹⁵¹ A 2018 review of 358 Michigan circuit court cases, encompassing 65% tort cases and 38% non-tort cases, found higher rates of referrals to case evaluation (45%) than to mediation (8%) and greater utilization of case evaluation (32%) than mediation (14%).¹⁵²

On the other hand, resistance to the mandatory use of ADR has arisen on a number of fronts, ranging from implementation difficulties to value clashes. To mitigate these concerns, evidence challenging the pervasiveness of problems was provided in studies as were remedies to address difficulties.

Doubts have arisen about the suitability of mandatory participation, not only for certain types of cases and circumstances, but also for some ADR processes. There are financial costs associated with mandatory ADR: additional court resources may have to be expended to coordinate and provide ADR services to mandated cases, among other administrative tasks.¹⁵³ These costs need to be weighed against any savings accruing to the court from cases that settle and avoid trial in order to determine whether mandating ADR participation will burden the court's financial situation. This cost-benefit analysis becomes more complicated when ADR benefits for parties are added to the calculation.

Mandatory referrals have been criticized for running the risk that inappropriate cases will be assigned to ADR.¹⁵⁴ Adjustments that have been made to referral procedures to minimize the inappropriate imposition of ADR include granting exemptions, mandating ADR with the choice of the particular ADR process left to parties, screening cases for ADR suitability, and excluding certain types of cases from the

¹⁴⁹ Bernstein (1993), *supra* note 56.

¹⁵⁰ Holbrook & Gray (1995), *supra* note 25.

¹⁵¹ Campbell & Pizzuti (2018, May 1), *supra* note 75.

¹⁵² Campbell & Pizzuti (2018, May 1), *ibid*.

¹⁵³ Kulp (2013), *supra* note 15.

¹⁵⁴ Mack (2003), *supra* note 5.

purview of mandatory ADR. These modifications have operated in a variety of circumstances.

In some federal courts, an exemption to automatic referral to arbitration may be granted under certain specified conditions, such as claims for money damages outside a specified range.¹⁵⁵ Maine provides parties with a choice of mediation, early neutral evaluation, and non-binding arbitration for Superior Court cases mandated to ADR.¹⁵⁶ In New York, a judge may order or recommend mediation for small claims cases which are subsequently screened by a case manager for mediation suitability.¹⁵⁷ In the opinion of one commentator, Maull, the expense entailed by mini-trials and summary jury trials should disqualify them for mandatory referral.¹⁵⁸

Also, the assortment of case types from which mandatory ADR has been excluded is extensive, and includes cases involving injunctive relief, domestic violence, abuse,¹⁵⁹ bankruptcy, social security,¹⁶⁰ “review on an administrative record, forfeiture action arising from federal statute, petition for habeas corpus or other proceeding to challenge criminal conviction or sentence, action brought by unrepresented person in custody, action for enforcement or quashing of administrative summons or subpoena, action by US to recover benefit payments, action by US to collect on student loan guaranteed by US, proceeding ancillary to proceeding in another court, action to enforce arbitration award,”¹⁶¹ to name a few. Moreover, mandatory non-binding arbitration in federal district courts and some state courts has been confined to financial disputes.¹⁶² Accordingly, the District Court of the Eastern District of New York referred cases seeking damages of at most \$150,000 to compulsory arbitration and excepted cases involving social security, tax matters, prisoners’ civil rights, and constitutional rights.¹⁶³

Restrictions on the ADR eligibility of cases may address criticisms directed at differences between ADR itself and adjudication, differences that mandating ADR brings to the fore. ADR has been criticized for subjecting vulnerable parties to informal

¹⁵⁵ Bernstein (1993), *supra* note 56; United States District Court, Eastern District of New York, *supra* note 47.

¹⁵⁶ Dana (2005), *supra* note 25.

¹⁵⁷ Kulp (2013), *supra* note 15.

¹⁵⁸ Maull, J. (1996). ADR in the federal courts: Would uniformity be better. *Duquesne Law Review*, 34:2, 245-275.

¹⁵⁹ Consider the Massachusetts Trial Court Policy authorizing Departments of the Trial Court to establish exemptions to the requirement for attorney-client discussion of ADR in Rule 5 of the Supreme Judicial Court Uniform Rules on Dispute Resolution (SJC Rule 1:18). See Trial Court Standing Committee on Dispute Resolution (n.d.), *supra* note 8.

¹⁶⁰ Wissler (2004), *supra* note 57.

¹⁶¹ Wissler, R.L. (2011). Court-connected settlement procedures: Mediation and judicial settlement conferences. *Ohio State Journal on Dispute Resolution*, 26:2-3, 271-325, 280-281.

¹⁶² Bernstein (1993), *supra* note 56; Erickson & Savage (1999, August), *supra* note 82; Kulp (2013), *supra* note 15; United States District Court, Eastern District of New York, *supra* note 47.

¹⁶³ United States District Court, Eastern District of New York, *ibid*.

procedures that fail to protect these individuals as fully as the formal legalism of adjudication.¹⁶⁴ Mandating ADR would have the effect of increasing the prevalence of weaker procedural protections in dispute resolution endeavors. To alleviate this concern, the needs of vulnerable parties would be considered when cases are screened for ineligibility due to a power imbalance, including domestic violence.¹⁶⁵ In any event, given the absence of empirical evidence that weak, susceptible parties are better protected in adjudication than, say, mediation, the validity of this criticism becomes questionable.¹⁶⁶

Additional concerns that ADR may obstruct the court's task to contribute to knowledge about the application of the law by reducing the cases that come under the court's scrutiny have been exacerbated by ADR mandates.¹⁶⁷ Although courts need to ensure that their drive for efficiency does not infringe upon the dispensation of justice, the exclusion of cases that involve issues concerning legal rights or constitutional values or have precedential importance from ADR could help courts balance these two interests.¹⁶⁸

Doubts have arisen about the suitability of mandatory participation for ADR processes portrayed as consensual. Mediation has been at the forefront of the debate about the appropriateness of marrying mandates to ADR.¹⁶⁹ Self-determination and choice are identified as core values of mediation by scholars and professional organizations.¹⁷⁰ Accordingly, the mediator's obligation to mediate in accordance with the principle of self-determination whereby parties make "free and informed choices as to process and outcome" is the first standard in the American Bar Association's guide for ethical conduct among mediators.¹⁷¹ Party choice is commonly exercised at three stages of the mediation process – at the threshold of mediation when parties are faced with a choice about entering into mediation; throughout the mediation process, when parties can choose whether to continue participating; and when settlement comes under consideration and parties choose between accepting or rejecting an agreement. Massachusetts court rules, for instance, which govern the conduct of neutrals operating under court auspices, enjoin neutrals from coercing parties into agreements at ADR

¹⁶⁴ Wissler (1997), *supra* note 42.

¹⁶⁵ Wissler (1997), *ibid.*

¹⁶⁶ Wissler (1997), *ibid.*

¹⁶⁷ Wissler (1997), *ibid.*

¹⁶⁸ Wissler (1997), *ibid.*

¹⁶⁹ Welsh, N.A. (2002). Disputants' decision control in court-connected mediation: A hollow promise without procedural justice. *Journal of Dispute Resolution*, 2002:1, 179-192.

¹⁷⁰ This view is presented by scholars Hedeon (2005), *supra* note 35; and Welsh (2002), *ibid.*; assessed by Wissler (1997), *supra* note 42; and incorporated by the ABA. (2005). Model Standards of Conduct for Mediators. Retrieved May 17, 2019, from https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.pdf

¹⁷¹ ABA (2005), *ibid.*

processes such as mediation and case evaluation.¹⁷² Critics of mandatory mediation argue that the coercion exercised at the initial stage of mediation ends up infringing upon party self-determination and choice at all stages of mediation. Mandating mediation participation manifestly obviates party choice about entering into mediation. Instead of terminating at the entry stage, critics claim that the initial coercion permeates the ensuing mediation process, compelling parties to continue with participation and to settle.¹⁷³

To mitigate parties' loss of choice about entering into ADR, commentators have urged emphasizing the voluntary nature of settlement.¹⁷⁴ Parties' ability to freely decide against settling would be more credible though if accompanied by assurances that rejecting settlement would not affect their case nor would penalties be imposed.¹⁷⁵ Such assurances would be inconsistent with the practices of informing the court about developments in ADR sessions¹⁷⁶ or imposing charges and fee-shifting costs for rejecting non-binding arbitration awards.¹⁷⁷ The commentator, Hedeem, recommends that parties receive written notice of their right to withdraw from mediation and that rejecting settlement will not affect their case. The voluntariness of mandatory ADR may also be furthered by the introduction of party choice over the type of ADR process. A mandatory ADR program could offer a selection of ADR processes from which parties would choose their preferred option. An investigation of settlement rates in cases mediated at courts in Cook County, Illinois revealed that higher settlement rates (ranging from 70% to 84%) were produced by mandatory ADR programs that offered parties a choice of ADR process than were generated by mandatory ADR programs where courts assigned the ADR process (with rates varying between 45% and 65%).¹⁷⁸ Giving parties a choice of ADR options even when participation is mandated could, suggested the commentator, Kulp, promote both ADR utilization and party empowerment.¹⁷⁹

Research-based evidence indicates that mandating mediation does not create pressure to settle. The theoretical apprehension that "coercion into" mediation produces "coercion in" mediation has been tested in research on litigants' experience of pressure during mediation.¹⁸⁰ Studies have shown that party complaints about their actual experience in mandated ADR or decisions to opt-out are not typical responses to

¹⁷² Mass SJC Uniform Rules on Dispute Resolution Rule 9: Ethical Standards (c)(vi). Available at <https://www.mass.gov/supreme-judicial-court-rules/uniform-dispute-resolution-rule-9-ethical-standards#-c-informed-consent>

¹⁷³ See, e.g., Welsh (2002), *supra* note 169; Wissler (1997), *supra* note 42.

¹⁷⁴ Hedeem (2005), *supra* note 35; Senft & Savage (2003), *supra* note 27.

¹⁷⁵ Hedeem (2005), *ibid.*

¹⁷⁶ Communication between ADR practitioners and the court occurs in Massachusetts' court-connected dispute intervention and in court-connected mediation in some California counties, *infra* note 265.

¹⁷⁷ Griller et al. (2011, April 15), *supra* note 14.

¹⁷⁸ Kulp (2013), *supra* note 15.

¹⁷⁹ Kulp (2013), *ibid.*, at 389-390.

¹⁸⁰ Wissler (1997), *supra* note 42.

court-ordered mediation.¹⁸¹ A study that compared mandatory mediation with voluntary mediation for small claims cases in state district courts in Boston found that when cases settled, there was no significant difference (at the .05 level of significance) in party reports of mediator pressure to settle, and similarly, when cases failed to settle, party reports of settlement pressure from mediators were not significantly greater for mandatory than voluntary mediation cases.¹⁸² These small claims research results roughly comport with the findings across several studies of divorce mediation, which do not show consistent patterns of differences in party reports of mediator pressure to settle between mandatory and voluntary mediation.¹⁸³

Proposals to minimize the risk of coercion in mediation have included excluding judges from mediation participation, protecting confidentiality, informing parties of their right to refuse to settle, imposing negative consequences on practitioners who exert settlement pressure on parties, and precluding mediator evaluation of compliance with the requirement of good faith participation.¹⁸⁴ Mediator codes of ethics can be modified to emphasize avoiding undue influence as well as coercion to reinforce the use of mediator's undue influence as a ground for reviewing ADR agreements.¹⁸⁵ Waiving fees for court-connected ADR, particularly for indigent litigants, would mitigate the burden that mandating ADR participation would impose on parties.¹⁸⁶ The institution of a post-mediation cooling-off period before an agreement is finalized has been proposed to minimize even latent settlement pressure in ADR.¹⁸⁷ The effectiveness of these proposals awaits further study.

Research into the impact of the mode of ADR entry – whether mandatory or voluntary – on such efficiency measures as settlement rates, disposition time, and costs has produced mixed results. A 1995 small claims mediation study, conducted by Wissler, that involved three groups of small claims litigants – successful mediation participants (72 cases), unsuccessful mediation participants who proceeded to trial (53 cases), and trial litigants (96 cases) – found that settlement rates were unaffected by the presence or absence of party choice about participating in mediation.¹⁸⁸ Wissler's 1997 comparison study of mandatory ADR with voluntary ADR for small claims cases in state district courts in Boston and common pleas cases in Ohio courts found that the difference in settlement rates between mandatory and voluntary ADR was not significant at the .05 level of significance, which led the researcher to speculate that "finding the settlement rate was not *higher* in mandatory mediation suggests that parties required to try mediation did not feel compelled to accept a settlement."¹⁸⁹ This

¹⁸¹ Cited by Mack (2003), *supra* note 5.

¹⁸² Wissler (1997), *supra* note 42.

¹⁸³ Cited by Wissler (1997), *ibid*.

¹⁸⁴ Hedeon (2005), *supra* note 35; Senft & Savage (2003), *supra* note 27, at 343.

¹⁸⁵ Welsh (2001), *The thinning...*, *supra* note 28.

¹⁸⁶ Maull, (1996), *supra* note 158.

¹⁸⁷ Hedeon (2005) *supra* note 35; Welsh (2001), *The thinning...*, *supra* note 28.

¹⁸⁸ Wissler (1995), *supra* note 65.

¹⁸⁹ Wissler (1997), *supra* note 42, at 581.

study also showed no significant difference between mandatory and voluntary mediation in small claims cases regarding the nature of the agreements reached or in agreement compliance, or time to settlement.¹⁹⁰ Moreover, for the mediated small claims cases, the mode of entry into mediation did not have a significant impact on time to settlement; party control over process or outcome; the nature of the outcome; parties' attitudes towards one another or their relationship; their satisfaction with, assessment of, or compliance with the outcome; their view of the mediator; or party accounts of developments during the mediation session. On the other hand, parties' satisfaction with the small claims mediation process and their perception of process fairness were significantly more widespread among voluntary than among mandatory mediation parties.

With respect to mediated common pleas cases, the type of entry into mediation made no significant difference to parties' ability to express their views; their understanding of the other party, their view of process fairness or of the mediator; or to the mediator's use of such strategies as evaluating case merits, suggesting settlement options, or remaining silent.¹⁹¹ In contrast, the results of an evaluation of a California early mediation pilot showed that while a larger portion of cases were referred to mandatory than to voluntary mediation, settlement rates were higher for voluntary mediation than for mandatory mediation.¹⁹²

The effect of mandatory mediation on case disposition time is also unclear. The Boston small claims mediation study found no significant difference in time to settlement between mandatory mediation and voluntary mediation of small claims cases.¹⁹³ In another study, comparison between mandatory early mediation, voluntary mediation, and non-mediation in a federal court for the Western District of Missouri indicated that disposition time was shortest for cases mandated to early mediation, which may be partly attributable to the time frame of the referral process.¹⁹⁴

A 1997 overview of research into compulsory and mandatory mediation, together with her examination of the effects of voluntary and mandatory ADR, led the researcher, Wissler, to conclude that "the findings of these and prior studies suggest that costs associated with mandatory mediation are relatively few, compared to the benefits that mediation provides as an alternative to adjudication."¹⁹⁵ Just as the opportunity for ADR benefits to parties is seen to tip the balance in favor of mandatory ADR, the court's adoption of the goal of tending to party needs and interests may offset the negative consequences of pursuing an efficiency goal.

¹⁹⁰ Wissler (1997), *ibid.*

¹⁹¹ Wissler (1997), *ibid.*

¹⁹² Judicial Council of California. (2004, February) *supra* note 78, at 27, 29.

¹⁹³ Wissler (1997), *supra* note 42.

¹⁹⁴ Lande (2005), *supra* note 52.

¹⁹⁵ Wissler (1997), *supra* note 42, at 566.

V. ADR and the goal of addressing party needs and interests: Providing parties with an opportunity to obtain ADR benefits

The pursuit of court efficiency through the use of court-connected ADR, reinforced by mandatory ADR participation, has led to warnings about the elevated risk that ADR might be undermined.¹⁹⁶ Inappropriate cases might be referred to ADR in an effort to reduce the court's workload. To cut delays, ADR sessions might be curtailed. To raise settlement rates, ADR referrals might prioritize cases more conducive to settlement, effectively restricting the ADR access of more challenging cases. The focus on settlements might induce greater use of directive tactics by practitioners or increase settlement pressure on parties. ADR quality or process fairness might be sacrificed to quantity.¹⁹⁷ Adopting the fulfillment of party needs and interests as an ADR goal may shield ADR from incursions by the court's drive for efficiency.¹⁹⁸ A focus on party concerns will introduce ADR standards for furthering party interests that can serve as a counter-weight to the court's efficiency interests.

A number of courts have included the fulfillment of party concerns as one of their goals for court-connected ADR. Federal statute lists "greater satisfaction of the parties" along with increased efficiency among the potential benefits to be obtained from ADR use in federal district courts.¹⁹⁹ Massachusetts court rules recognize that that in some cases ADR could "produce more satisfying results, swifter resolutions, and lower costs, both social and personal...."²⁰⁰

The benefits that purportedly accrue to parties from participating in ADR include responsiveness to party interests, the opportunity to speak and be heard untrammelled by standard court protocols, discussion of issues irrespective of legal cognizability, satisfaction with process and outcome, preservation of relationships, and settlements tailored to parties' interests and dependent upon parties' agreement.²⁰¹ Majorities of 60% or more surveyed New Mexico judges indicated that ADR offered parties the opportunity to achieve better solutions, party communication, and understanding of dispute issues. Improved compliance, preservation of party relationships, and an expanded range of issues to consider were also specified as ADR benefits by sizable minorities of at least 40% of the judges.²⁰²

¹⁹⁶ Brazil (2002), *supra* note 32. See also Boyarin (2012), *supra* note 13; Maull (1996), *supra* note 158; and Welsh (2001), *The thinning...*, *supra* note 28.

¹⁹⁷ Brazil (2002), *ibid.*

¹⁹⁸ Boyarin (2012), *supra* note 13.

¹⁹⁹ Alternative Dispute Resolution Act of 1998 (Public Law 105-315 s. 2). Available at <https://www.govinfo.gov/content/pkg/PLAW-105publ315/pdf/PLAW-105publ315.pdf>

²⁰⁰ Trial Court Standing Committee on Dispute Resolution (2005, June), *supra* note 8.

²⁰¹ Mack (2003), *supra* note 5; Senft & Savage (2003), *supra* note 27; Wissler (1997), *supra* note 42.

²⁰² Griller et al. (2011, April 15), *supra* note 14.

Adjudication typically approaches conflict as a competition between parties' claims which are subjected to rules and precedents by third parties, such as judges, who decide which claims get enforced.²⁰³ The task of resolving conflict, then, is transferred from disputants to the third-party, usually a judge. In nearly all forms of ADR, however, parties are empowered to the extent that they retain control over approval of the agreement settling the dispute. In mediation, parties are further empowered through their control over the dispute resolution process. Mediation operates under the assumption that parties have the ability to resolve disputes, which they exercise through communication about issues that matter to them.²⁰⁴ Thus, according to Maryland's District Court Day of Trial ADR program, the express purpose of court-connected ADR is the empowerment of parties to resolve their conflicts, namely, "to take ownership of the solution, to develop creative solutions, to consider conflict differently in the long term, and to be open to collaborative possibilities."²⁰⁵

Evidence of actual benefits from ADR to parties:

Claims about benefits received by parties from ADR participation have been tested to some degree. In Wissler's 2004 review, early neutral evaluation of general jurisdiction civil cases earned positive ratings from parties according to three studies, with most parties finding that the process was fair.²⁰⁶ Settlement rates varied between 23% and 51% in four studies. The single study that considered the effect of early neutral evaluation on party relationships showed that the percentage of attorneys reporting no effect on party relationship was equal to or greater than the percentage reporting improved party relationships.²⁰⁷ As a result of their experience with appellate mediation, according to one study,²⁰⁸ parties were pleased with both the process and the mediator and regarded the process and outcome as fair. Generally, parties were able to present their case, exercise control over the process and contribute to the outcome.²⁰⁹ Several divorce mediation studies found satisfaction rates ranging from 35% to 60%.²¹⁰ A minor increase in party communication and co-operation following mediation of custody disputes tended to be temporary according to some divorce mediation studies. Even so, satisfaction with mediation in family cases tended to be more widespread than for adjudication.²¹¹

²⁰³ Della Noce et al. (2002), *supra* note 27.

²⁰⁴ Della Noce et al. (2002), *ibid.*; Senft & Savage (2003), *supra* note 27; Wissler (1997), *supra* note 42.

²⁰⁵ Charkoudian, L. (2016, January). *What works in District Court day of trial mediation: Effectiveness of various mediation strategies on short- and long-term outcomes*. at 6. Administrative Office of the Courts, Maryland Judiciary. Retrieved May 31, 2019, from <https://www.courts.state.md.us/sites/default/files/import/courtoperations/pdfs/districtcourtstrategiesfullreport.pdf>

²⁰⁶ Reviewed by Wissler (2004), *supra* note 57.

²⁰⁷ Wissler (2004), *ibid.*

²⁰⁸ Cited by Wissler (2004), *ibid.*

²⁰⁹ Wissler (2004), *ibid.*

²¹⁰ Cited by Mack (2003), *supra* note 5.

²¹¹ Cited by Mack (2003), *ibid.*

An evaluation of the impact of settlement conferences and mediation on parties, conducted by Charkoudian in 2016, contrasted the impact of participation in these ADR processes to the impact of participation in adjudication.²¹² Out of 461 civil cases in Maryland state district courts, the evaluation study showed that parties who participated in court-connected ADR were significantly more likely than adjudication parties to report that they accepted responsibility for the dispute, recognized the other party's acceptance of responsibility, and that all issues were addressed and resolved. Party communication was more prevalent during ADR than court unless the parties were represented. Represented parties were more likely to express themselves in court than in ADR. ADR had no significant impact on parties' feeling heard, assessment of fairness, feelings of control or influence over the process, or perception of settlement options. The settlement rate for ADR cases was 53%. Based on party responses in 166 of the 461 cases following a three to six month period after the intervention, the probability of agreement durability as well as improvements to parties' relationship and their attitudes towards the opponent was higher for ADR parties than for adjudication parties.²¹³

Seven studies of small claims mediation, reviewed by Wissler (2004),²¹⁴ demonstrated high approval ratings from parties for the process, outcome, and the practitioner in mediation. Majorities of parties were able to present their case, participate in resolving the dispute, and regard their agreement as fair. Non-monetary terms, e.g., installment plans, were more common to mediated agreements than to judicial decisions. When agreements concerned monetary outcomes, the likelihood of the plaintiff receiving money was greater after mediation than after trial. All studies but one that compared mediation to adjudication found process approval and positive attitudes about the third party (the mediator or judge) more prevalent among mediation parties. The impact of small claims mediation on party relationships, however, was unclear: in one study, there was no difference between the number of parties who experienced relationship improvement and those who did not. In a second study, improved relationships were more frequent when the mediation ended in agreement but not when mediation failed or cases were tried.

Mediation of general jurisdiction civil cases received high approval ratings from parties with respect to the process, the outcome, and the mediator in 16 studies that were reviewed by Wissler (2004).²¹⁵ Most parties indicated that the process and outcome were fair; and they were able to present their case and exercise control over process or contribute to the outcome. Improved party relationships were not, however, typical of general civil mediation. A majority of parties in two studies reported no

²¹² Charkoudian, L. (2016, February), *supra* note 73.

²¹³ Charkoudian, L. (2016, February), *ibid*.

²¹⁴ Reviewed by Wissler (2004), *supra* note 57.

²¹⁵ Wissler, (2004), *ibid*.

change in their relationship to their opponent; and in four studies, improved relationships were only reported by minorities of parties as small as 5% up to 43%. As for the impact of general civil mediation on outcomes: the one study that contrasted mediation with trial outcomes suggested that while a mediating party was more likely to receive money than a trial party, the sum tended to be smaller than that received by the trial party. Overall, comparisons between mediation and non-mediation of general civil cases, conducted in five studies, failed to display a consistent pattern of differences.²¹⁶

On the whole, the available evidence provided some support for the conclusion that ADR participants benefited from ADR participation in certain respects such as settlements, agreements with non-monetary provisions, and satisfaction with the ADR process, outcome, and practitioner.²¹⁷ Although comparisons between ADR and adjudication produced mixed results, they did not, for the most part, show that parties benefited less from ADR participation than from adjudication. Party acquisition of ADR benefits may have been influenced by preparation that parties received from attorneys and by actions of the practitioner who conducted the ADR session.

Factors affecting parties' receipt of ADR benefits:

Attorney preparation:

Compared to less prepared parties, clients who received more attorney preparation for mediation of general jurisdiction civil cases were more likely to settle, approve of mediation, contribute to the outcome, express their views, approve of the mediator, and deem the mediation agreement to be fair according to Wissler's 2010 research.²¹⁸ The case seemed to be otherwise in studies of mediated domestic relations cases when parties relied on other sources to prepare. Settlement was less likely if parties sought out information on their own or consulted with court personnel than if they had refrained from preparation.²¹⁹ Likewise, parties' search for help before mediating in employment cases was associated with a lower probability of settlement compared to mediated cases in which no party search for pre-mediation assistance occurred.²²⁰

Presence of attorneys during mediation:

²¹⁶ Wissler, (2004), *ibid*.

²¹⁷ Wissler (2004) (comparing mediation and neutral evaluation with adjudication in small claims, general jurisdiction civil, and appellate cases, and finding mixed results that indicated that that ADR did better or the same as litigation with respect to settlement rates, assessment of process and outcome as fair, compliance rates, preserving parties' relationship, reducing disposition time and case costs), *ibid*.

²¹⁸ Wissler (2010), *supra* note 123.

²¹⁹ Cited by Wissler (2010), *ibid*.

²²⁰ Cited by Wissler (2010), *ibid*.

Attorney presence during mediation apparently depressed the likelihood of settlement in domestic relations cases.²²¹ Full settlement of the dispute was more likely when just one party or neither party had an attorney in attendance at the mediation than when both parties had their attorneys present.

Practitioner experience and use of ADR strategies:

The impact of practitioners on parties participating in mediation and settlement conferences for civil cases at Maryland state district courts was examined by Charkoudian in 2016 with respect to the strategies employed by practitioners during the ADR session and the extent of the practitioner's ADR experience.²²² In the study, data was collected from 269 parties directly after the intervention, and from 114 of the original parties three months later. Mediator tactics including caucusing, reflecting, eliciting, and offering opinions and solutions. Caucusing, which involved the practitioner meeting separately with each side of the dispute, made no difference to the probability of settlement, but did lead to a greater likelihood that parties would feel powerless and that the neutral would be seen to control the ADR outcome and exert pressure on parties. Caucusing was also associated with a lower level of satisfaction with either outcome or process and a greater probability of returning to court. Reflecting, whereby the practitioner mirrored parties' emotions and interests, increased the frequency of party reports of being heard and understood and of agreements tailored to party interests, but depressed settlement. Eliciting, which encouraged parties to devise solutions, was correlated to an increased probability of settlement, of feeling heard and understood, and of controlling the outcome; and to a decreased probability that parties would return to court to get the outcome enforced. The mediator's offering of opinions, solutions, or legal analysis had no statistically significant impact on parties in the short run, but was associated in the long-term with fewer reports of outcome satisfaction, of willingness to recommend ADR, and of outcome durability. The greater the amount of experience that the practitioner had with ADR, the lower the probability that parties would feel heard and understood, but in the long-term, substantial ADR experience also made it less likely that parties would return to court during the following year.²²³

Proposals for fulfilling the court's goal of addressing parties' needs through ADR:

Based on the above research, recommendations for initiatives to advance the achievement of the court's goal of addressing party needs through ADR include realigning the use of ADR strategies to reflect a greater priority for using eliciting and reflecting and a lower priority for caucusing.²²⁴ Rotating referrals among practitioners may be a way to expand their ADR experience and thereby increase the number of

²²¹ Wissler (2010), *ibid*.

²²² Charkoudian (2016, January), *supra* note 205.

²²³ Charkoudian, (2016, January), *ibid*.

²²⁴ Charkoudian, (2016, January), *ibid*.

experienced ADR practitioners to whom parties can turn. Implementation of these proposals needs to be examined for feasibility and effectiveness.

VI. The court's goal to provide justice through court-connected ADR

The core purpose of the work of American courts is to dispense justice by fulfilling their responsibility to resolve disputes through fair procedures.²²⁵ Parties appear in court to avail themselves of the court's dispute resolution function. When courts point disputing parties to court-connected ADR, the parties gain an opportunity to resolve their disputes outside the adjudication process. Research-based evidence of settlement rates generated by ADR participation demonstrates that parties will probably reap the benefit of ADR agreements. Nevertheless, the extent to which diverting disputants to ADR fulfills the court's responsibility to resolve disputes fairly has proven controversial, with disagreements centered around the question of whether the court's dispute resolution responsibility extends to ensuring that court-connected ADR comports with procedural justice and due process, that is, to ensuring that ADR procedures are fair.²²⁶

Procedural justice is critical to the court's dispute resolution function,²²⁷ and procedural justice requires fair processes, transparent and impartial action and decision-making, and an opportunity to parties for voice (to speak and be heard).²²⁸ Due process protections – such as impartiality, notice, opportunity to present one's case and hear the other side, among other features²²⁹ – are required when court actions are taken against individuals.²³⁰ Due process is consequently a means of protecting the individual from the power of the state to arbitrarily “cause a deprivation.”²³¹

The argument against the applicability of procedural justice or due process to certain forms of court-connected ADR, rests on the purported incompatibility between the voluntary nature of ADR and coercive or ultra vires conduct by the practitioner.²³² As

²²⁵ Brazil (1999), *supra* note 15; Senft & Savage (2003), *supra* note 27; Welsh (2001), *The thinning...*, *supra* note 28

²²⁶ See Welsh (2001), *The thinning...*, *ibid.*

²²⁷ Senft & Savage (2003), *supra* note 27.

²²⁸ COPS. (2015, April). Organizational change through decision making and policy: A new procedural justice course for managers and supervisors. *Newsletter of the COPS Office*, 8:4. Retrieved May 23, 2019, from https://cops.usdoj.gov/html/dispatch/04-2015/a_new_procedural_justice_course.asp

²²⁹ This characterization of due process derives from a description of some due process requirements, including an unbiased court, notice of the proposed action and its basis, opportunity to argue against the action, to present favorable evidence and learn about opposing evidence, etc. (Strauss, P. (n.d.), *Due process*. Cornell Law School (citing Friendly, 1975), Retrieved May 22, 2019, from https://www.law.cornell.edu/wex/due_process). See also Welsh (2002) (identifying due process requirement in terms of “right to be heard before decision is made,” “right to an impartial decision-maker,” and permission to “retain counsel.”), *supra* note 169, at 188.

²³⁰ Senft & Savage (2003), *supra* note 27; Strauss (n.d.), *ibid.*

²³¹ Welsh, 2001, *The thinning...*, *supra* note 28.

²³² Welsh (2002), *supra* note 169.

applied to a voluntary dispute resolution process like court-connected mediation, due process concerns would become applicable only when the mediator acted coercively or exceeded his or her authority. As a result, due process would be irrelevant to mediation by virtue of the latter's consensual nature. Parties' voluntary participation and agreement in court-connected mediation, so critics claim, effectively eliminate the possibility of arbitrary deprivation by the court and are facially inconsistent with a claim of coercive mediator behavior. To show that voluntariness and consent were violated during mediation, evidence of an egregious exercise of mediator coercion would probably be needed to override the court's presumption that agreements reached through participation in a consensual dispute resolution process were voluntary and self-determined or self-imposed by parties.²³³

Proponents' position that procedural justice standards and due process requirements attach to court-connected ADR is based on the court's mission to deliver justice through dispute resolution as well as party expectations for fairness from court action. By establishing a connection between itself and non-adjudicatory forms of dispute resolution or ADR – be it court authorization, support, encouragement, referrals, mandates, recommendations, provision of ADR services, statute, or other connections²³⁴ – the court is exercising authority over court-connected ADR and consequently becomes accountable for the quality of such ADR.²³⁵ The practitioner in court-connected ADR is placed in the role of court – and therefore state – representative,²³⁶ which further underpins the relevance of due process to ADR. Thus, the procedural justice and due process norms that govern the court's dispute resolution activity are extended to any other dispute resolution processes over which the court exerts its influence.²³⁷

As for parties, they “want the courts to resolve their disputes in a manner that feels like justice is being done.”²³⁸ Parties' perception of the fairness of an ADR process is determined by their experience of the operation of various factors during the ADR session, the most important of which were identified through procedural justice research as neutrality and the dignitary factors of voice, consideration, even-handed respectful treatment, and control.²³⁹ These fairness factors – which relate to parties' presentation of their stories and their influence on the ADR process and outcome as well as the conduct of the third-party practitioner in acknowledging party dignity, in seriously attending to party accounts, and exhibiting impartiality and a lack of bias²⁴⁰ – are congruent with the components of procedural justice and due process.

²³³ Welsh, (2001), *Making deals...*, *supra* note 18.

²³⁴ Boyarin (2012), *supra* note 13.

²³⁵ Boyarin (2012), *ibid.*; Welsh (2001), *Making deals...*, *supra* note 18.

²³⁶ Brazil (1999), *supra* note 15; Welsh, (2001), *Making deals...*, *ibid.*

²³⁷ Welsh (2001), *Making deals...*, *ibid.*

²³⁸ Welsh (2001), *Making deals...*, *ibid.*, at 791.

²³⁹ Mack (2003), *supra* note 5; Welsh (2002), *supra* note 169; Wissler (2011), *supra* note 161.

²⁴⁰ Mack (2003), *ibid.*; Welsh (2002), *ibid.*; Wissler (2011), *ibid.*

Evidence of ADR fairness:

Evidence is available for guidance in figuring out whether various forms of court-connected ADR – that is, arbitration, mediation, neutral evaluation, and judicial settlement conferences – comport with party notions of fairness.

The fairness of the court-connected neutral evaluation process was recognized by most litigants in general civil cases.²⁴¹ Mediation was also deemed a fair process by majorities of parties in general civil cases, small claims cases, and appellate cases.²⁴² The outcomes of mediated general civil and small claims cases were also considered fair.²⁴³ The procedural fairness factors of voice and control were experienced by parties in general civil and small claims mediation, with majorities reporting that they were able to tell their story and contribute to the outcome.²⁴⁴ The amount of time that parties or their attorneys in mediated general civil cases spent on presenting their case was positively related to their assessment of process fairness.²⁴⁵ Appellate case mediation provided parties with an “opportunity for participation.”²⁴⁶ Process control was also exerted by mediating parties in general civil cases.²⁴⁷ Party accounts of mediators who were neutral and understood the dispute demonstrated the presence of the fairness factors of impartiality and consideration in mediated general civil and small claims cases.²⁴⁸ Settlement pressure was not exerted by mediators according to parties in general civil cases.²⁴⁹

In terms of fairness, court-connected mediation tended to fare as well or better than adjudication and judicial settlement conferences. Wissler’s 1995 study of small claims cases contrasted parties’ fairness assessment of mediation with that of adjudication with respect to three groups of litigants - those whose mediation was successful in achieving agreement, those whose mediation was unsuccessful and proceeded to trial, and adjudication litigants whose cases were tried.²⁵⁰ Irrespective of outcome, mediation was considered fairer than trial, providing parties with more opportunities for voice and control over process and outcome than did adjudication. Moreover, mediators were more likely to be regarded by parties as impartial and to

²⁴¹ Wissler (2004) (citing results of three studies of neutral evaluation that examined party views), *supra* note 57.

²⁴² Wissler (2002) (investigating mediation of general civil cases in Ohio courts), *supra* note 30; Wissler (2004) (reviewing seven studies of mediated small claims cases and 16 studies of mediated general civil cases), *ibid.*

²⁴³ Wissler (2002), *ibid.*; Wissler (2004), *ibid.*

²⁴⁴ Wissler (2002), *ibid.*; Wissler (2004), *ibid.*

²⁴⁵ Wissler (2002), *ibid.*

²⁴⁶ Wissler (2004), *supra* note 57, at 75.

²⁴⁷ Wissler (2004), *ibid.*

²⁴⁸ Wissler (2002) *supra* note 30; Wissler (2004), *ibid.*

²⁴⁹ Wissler (2002), *ibid.*; Wissler (2004), *ibid.*

²⁵⁰ Wissler (1995), *supra* note 65.

understand the dispute than were judges.²⁵¹ In other studies comparing mediation to adjudication, mediation parties were as likely or more likely than adjudication parties to consider the process to be fair.²⁵²

Court-connected mediation and judicial settlement conferences in general civil cases were examined in Wissler's 2011 investigation into attorney views of two judicial settlement conference models (conferences conducted by the trial judge and conferences conducted by a non-trial judge) and three mediator models (court staff as mediators, volunteers from a court-approved roster as mediators, and private mediators unconnected to the court).²⁵³ The relation between these ADR models and the expectation of impartiality was addressed. Attorney concern over likely bias and prejudice to subsequent litigation was highest for trial judges in settlement conferences, lowest for staff mediators, with similar assessments of likely bias for non-trial judges and volunteer mediators. The likelihood that parties would be included in the ADR process – which the researcher surmised would provide parties with an opportunity for voice, outcome control, and respectful treatment – was thought by attorneys to be greatest for staff mediators and private mediators and lower for volunteer mediators and judges, although the likelihood of party inclusion was higher for non-trial than for trial judges.²⁵⁴

The usual exclusion of parties from judicial settlement conferences was also a factor in parties' view that court-connected arbitration was more fair than conferences.²⁵⁵ Parties considered arbitration to be fair because it allowed them their day in court, and equated the fairness of arbitration with that of trials.²⁵⁶

Overall, the studies' findings about the fairness of ADR processes of arbitration, mediation, neutral evaluation, and settlement conferences are in keeping with the findings reported in a large portion of the ADR literature.²⁵⁷

Impact of circumstances such as mediator strategies, mandatory participation, attorney representation and preparation on parties' perception of ADR fairness:

Impact of practitioners' ADR strategies and characteristics on parties' perception of fairness:

²⁵¹ Wissler (1995), *ibid.*

²⁵² Wissler (2002) *supra* note 30.

²⁵³ Wissler (2011), *supra* note 161.

²⁵⁴ Wissler (2011), *ibid.*

²⁵⁵ Keilitz, cited by Kakalik et al. (1995, December 31), *supra* note 25.

²⁵⁶ Keilitz, cited by Kakalik et al. (1995, December 31), *ibid.*

²⁵⁷ Charkoudian (2012) (concluding that a major portion of the ADR literature showed that parties obtain "a fair process and outcome"), *supra* note 40, at 4.

Mediator experience with mediating (investigated in a study of mediated general civil cases), although associated with a higher settlement rate, was not related to parties' view of process fairness.²⁵⁸ Furthermore, neither the amount of the mediator's training nor his or her substantive knowledge or experience with the legal issues, were related to settlement or to process fairness.²⁵⁹ The strategies employed by mediators in conducting mediation, however, were shown to be related to parties' experience of fairness.

Research conducted by Charkoudian (2016, January) on the effects of dispute resolution strategies employed by third-party practitioners in court-connected mediation and settlement conferences at Maryland state district courts showed a likely impact from caucusing, reflecting, and eliciting on such fairness variables as voice and control, but not on respectful treatment and consideration.²⁶⁰ Findings were based on party responses to pre- and post-intervention surveys, court records, and observations of ADR sessions. Data analysis, which employed the .05 level of significance, showed that caucusing depressed variables associated with fairness while eliciting and reflecting promoted those variables while the strategy of offering opinions, recommendations, and legal advice failed to make a significant difference to the fairness of the ADR proceedings.

According to study data, the use of a caucusing strategy seemed to affect fairness variables of voice, control, and consideration. Increasing the time that parties spent in caucuses decreased parties' ability to speak and make a difference while increasing parties' feelings of powerlessness. In addition, more caucusing made party reports that the practitioner obstructed the emergence of issues and exerted pressure to settle more likely. Reflecting had an encouraging effect on voice and control, increasing parties' sense of being able to speak and make a difference. Eliciting increased the probability of parties listening and understanding one another and together controlling the outcome even as it decreased the likelihood that the practitioner was seen to control the outcome, exert settlement pressure, and block issues from consideration. Eliciting was the only strategy to increase the likelihood of settlement. Reaching agreement had a positive impact on fairness factors related to voice and control, decreasing parties' feelings of powerlessness and increasing their sense that they were listened to and understood, that they could speak and make a difference, and that the outcome was fair. None of these strategies as well as the practitioner strategy of offering opinions, solutions, or legal advice significantly impacted party accounts of being respected, heard, or understood by the ADR practitioner. In fact, Charkoudian's research did not show that opinions, solutions, or legal advice offered by the ADR practitioner significantly affected fairness.²⁶¹

²⁵⁸ Wissler (2002), *supra* note 30; Wissler (2004), *supra* note 57.

²⁵⁹ Wissler (2004), *ibid.*

²⁶⁰ Charkoudian (2016, January), *supra* note 205.

²⁶¹ Charkoudian (2016, January), *ibid.*

Notwithstanding Charkoudian's findings about the effects of mediators' offering opinions and recommendations, prior research into mediated general civil cases reviewed by Wissler (2004) found significant impact on fairness from the mediator's recommending and evaluating activities.²⁶² Although mediator suggestions about settlement options bore no relationship to process fairness as perceived by parties, recommending a specific settlement increased settlement pressure and decreased process fairness more than did refraining from particular settlement recommendations. Mediator evaluation of the merits of the case had the opposite effect: no settlement pressure was experienced by parties, and their assessment of process fairness was higher after mediator case evaluation than after mediator silence about case merits. Mediator's overall silence though had no significant impact on parties' perception of process fairness.²⁶³ Anecdotal evidence connected the mediation stratagem of predicting undesirable consequences following withdrawal from mediation to parties' feelings of pressure to continue their participation in mediation.²⁶⁴

Mediator communication of recommendations and information about the progress of the mediation to the court may risk a deleterious effect on the process fairness of court-connected mediation. Depner and associates (1994) compared responses from 1,130 parties in California counties where mediator recommendations to the court were authorized to those from 383 parties in counties lacking such authorization. Parties in counties allowing mediator-court communication were 5% less likely to feel heard; 5% more likely to feel pressured into acquiescing to unwelcome developments, and 6% more likely to "feel too intimidated to express their concerns."²⁶⁵

Impact of mandating ADR participation on parties' experience of ADR fairness:

Court mandates for ADR participation dispense with the need for party consent to enter into ADR. Judicial rulings from some courts have determined that such mandates comport with the right to due process as long as ADR outcomes are non-binding, trial is not unreasonably obstructed, and settlement pressure is not "undue."²⁶⁶ The actual impact of mandatory ADR participation on parties' experience of fairness has been subjected to investigation.

In general, research has not shown an adverse effect on parties' view of ADR process fairness from mandatory ADR. A review of 27 studies of mediated general jurisdiction civil cases revealed that most studies found that the type of parties' entry

²⁶² Lande (2004), *supra* note 52; Wissler (2004), *supra* note 57.

²⁶³ Wissler (2002), *supra* note 30.

²⁶⁴ Hedeem (2005), *supra* note 35, at 281.

²⁶⁵ Depner et al (1994), cited by Charkoudian (2012, August), *supra* note 40, at 28.

²⁶⁶ Cited by Wissler (1997) (noting also that undue pressure may be related to increased costs and delays and to imposition of financial penalties for rejecting ADR outcome), *supra* note 42.

into mediation – whether voluntary or mandatory – made no difference to parties’ perception of the fairness of their mediation.²⁶⁷ Wissler’s 1997 research comparing voluntary and mandatory mediated small claims and common pleas cases found that the mode of entry into mediation of common pleas cases had no significant impact on parties’ view of process fairness or voice, or on mediator use of case merit evaluation, settlement suggestion, or silence.²⁶⁸ Furthermore, small claims parties’ experience of control over process or outcome did not vary significantly with mode of entry. Correspondingly, studies of divorce mediation settlement found that settlement pressure from mediators on parties was no more likely in mandatory than in voluntary mediation. Yet, in Wissler’s 1997 research, the perception of process fairness was significantly more prevalent among parties in voluntary than in mandatory small claims mediation.²⁶⁹ Party reactions to mandatory mediation did not for the most part differ by race: white and non-white plaintiffs had similar assessments of the mandated mediation of their case except with respect to making recommendations. Non-white plaintiffs were less willing to recommend mediation.²⁷⁰

Access to justice through court-connected ADR

The infrastructure of laws and procedures that enable courts to deliver justice through dispute resolution has the unintended consequence of impeding access to such justice for considerable numbers of potential litigants. The complexity of procedures and the intricacies and specialized terminology of the law present obstacles that require expertise to overcome.²⁷¹ The task of acquiring the expertise necessary to navigate the court system is daunting for most and the cost of obtaining expert services is beyond the means of many.²⁷² “An estimated four-fifths of the individual legal needs of the poor, and a majority of the needs of middle-income Americans, remain unmet.”²⁷³ Parties who seek to resolve their disputes in court without the benefit of expert guidance from attorneys – so-called unrepresented or pro se parties – make up 3%-48% of parties in general civil cases, 35%-95% of domestic relations parties, and 79%-99% of parties in small claims and housing cases.²⁷⁴ To increase access to justice, courts have instituted court-connected ADR along with such other initiatives as providing information through written materials and staff assistance as well as simplifying legal forms.²⁷⁵ For example, the establishment of court-annexed arbitration pilot projects at

²⁶⁷ Wissler (2002), cited by Charkoudian (2012, August) *supra* note 40.

²⁶⁸ Wissler (1997), *supra* note 42.

²⁶⁹ Wissler (1997), *ibid.*

²⁷⁰ Wissler (1997), *ibid.*

²⁷¹ Rhode, D. L. (2001). Access to Justice. *Fordham Law Review*, 69, 1785-1819. Retrieved March 3, 2016, from <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3709&context=flr>;

²⁷² Hannaford-Agor, P. & Waters, N. L. (2013). Estimating the cost of civil litigation. *Court Statistics Project.20:1*. Retrieved March 23, 2016, from http://www.courtstatistics.org/~media/microsites/files/csp/data%20pdf/csph_online2.ashx

²⁷³ Rhode (2009), *supra* note 271, at 869.

²⁷⁴ Wissler (2010), *supra* note 123.

²⁷⁵ Wissler (2010), *ibid.*

three federal courts in 1978 was justified as a way to increase access to justice.²⁷⁶ Subsequent research has explored the effectiveness of court-connected ADR in increasing access to justice.

Structural features of the judicial system that might affect ADR's contribution to increased access to justice:

ADR costs:

The costs of court-connected ADR to litigants are frequently estimated to be lower than the projected costs of litigation including trial.²⁷⁷ ADR costs should consequently prove less of a barrier to access to justice than would litigation costs. The assumption of ADR success in reaching settlement, however, is critical to this calculation. When ADR participation is predicated upon attorney representation – required by some courts for mediation of appellate cases, for example – ADR costs would be augmented by attorney fees, but might still be less than the costs of proceeding with litigation such as an appeal.²⁷⁸ Should mediation not lead to settlement and the appeal process ensue, then ADR would have boosted the totality of the party's litigation costs. Not only would pro se parties be denied access to justice through appellate mediation, but overall litigation costs would only be reduced by successful mediation and not by mediation per se, thereby constraining the contribution of appellate ADR to increasing access to justice. The same kind of economic analysis is applicable to non-binding court-connected arbitration.

Attorney representation at an arbitration hearing – a common occurrence – is a charge on parties.²⁷⁹ Should the arbitration award prove disappointing, the unhappy party may choose to reject the award and proceed to trial. The expense of trial, which would compound litigation costs, might be mitigated for the disappointed party if trial results were to improve on the arbitration award.²⁸⁰ If trial results were not better than the arbitration award by an amount specified in court rules, the trial-requesting party would suffer monetary penalties. Under such circumstances, court-connected arbitration would likely not increase access to justice for lower-income or risk-averse parties.²⁸¹

Variability in the availability of court-connected ADR in the judicial system:

Variability in the availability of court-connected ADR within a court system can introduce inequity in access to justice through ADR. A lack of uniformity among

²⁷⁶ Eisenberg (2016), *supra* note 81.

²⁷⁷ Bernstein (1993) (observing that a court-connected arbitration “hearing is likely to be less expensive than a trial on the merits”), *supra* note 56, at 2232.

²⁷⁸ Wissler (2004), *supra* note 57.

²⁷⁹ Bernstein (1993) (observing that some district courts require cases to be presented to the arbitrators through counsel), *supra* note 56.

²⁸⁰ Bernstein (1993), *ibid.*

²⁸¹ Bernstein (1993), *ibid.*; Griller et al. (2011, April 15), *supra* note 14.

individual courts in a particular judicial system could make access to ADR uneven, readily available in some courts, less so in others.²⁸² The measures used to ensure equitable access to court-connected ADR have varied with different judicial systems. In Florida, responsibility for the funding and operation of ADR was centralized in the state out of concern that dependence on funding by county had produced inequalities in access to and availability of Florida's celebrated court-connected ADR programs.²⁸³ The types of ADR services to be offered by the courts, the fees to be charged for services, exemptions from fees, referral procedures, ADR staffing, guidelines for the use of mediator services and the evaluation of mediators are among the features of ADR service delivery at all Florida courts are centrally regulated. The formula for allocating funds to individual courts for their ADR programs takes into account the cost of providing ADR services, the amount of fees collected, and the need for funding, etc., up to a designated maximum amount, in order to promote "equitable and fair access to mediation services across the state," all the while respecting diversity among the courts.²⁸⁴

Maryland's highly respected court-connected ADR is regulated through general court rules that apply to the ADR programs in all 18 district court locations and standardize the qualification of neutrals, quality assurance, ADR forms, confidentiality protection, data collection and court rules.²⁸⁵ Otherwise, ADR implementation varies locally. For instance, in Baltimore, court clerks refer cases to ADR practitioners who check with parties about their willingness to engage in ADR. In two other counties, ADR referrals come from the judge.

The effort to balance centrally-imposed uniformity with respect for local court diversity is common to both Florida's and Maryland's approach to maximizing equity in access to justice through ADR. New Mexico sought to achieve that same balance in order to remedy the "bewildering mixture of programs" that was ADR in the New Mexico court system as of 2011.²⁸⁶ Greater centralization of court ADR administration consistent with the exercise of autonomy by the individual courts was pursued. Specifically, the establishment of a central, state-wide court ADR commission was recommended to simplify centralized services and furnish broad guidelines and support to individual courts for effective ADR programs that were responsive to local needs and circumstances. Consistent with the court standard for access to justice, namely, that ADR be available irrespective of the locality or the financial situation of the court, this state commission would provide funding and other assistance to under-resourced

²⁸² Brazil (2002), *supra* note 32; Griller et al. (2011, April 15), *ibid.*

²⁸³ Commission on Trial Court Performance & Accountability. (2008, August). *supra* note 84.

²⁸⁴ Commission on Trial Court Performance & Accountability. (2008, August), *ibid.*, at 4.

²⁸⁵ Charkoudian, L. (2016, January). *supra* note 205.

²⁸⁶ Griller et al. (2011, April 15), *supra* note 14, at 4.

courts to enable implementation of ADR programming comparable in quality to that of other courts.²⁸⁷

The impact of attorney involvement in ADR on ADR access:

Noting that successful participation in ADR would be hampered by parties' communication difficulties, lack of familiarity with the process, excessive deference to the practitioner qua court representative, and inadequate information for assessing the consequences of settlement, Wissler addressed the question whether attorney representation during ADR would bypass these party deficiencies and promote ADR achievements. Mandatory mediated domestic relations cases at Maine courts and mediated general civil cases at Ohio common pleas courts were examined to determine the difference that attorney representation during mediation made to outcomes.²⁸⁸ Attorney representation in domestic relations mediation was found to have no effect on party perception of process fairness, settlement pressure, voice, or the impartiality of the mediator. This finding aligned with studies of EEO mediation which also found no significant impact on parties' assessment of fairness from attorney representation during the mediation process. Other domestic relations studies, however, reported mixed results concerning the relation between representation and process fairness or voice.²⁸⁹ The sizable number of parties in Wissler's study who indicated that they had voice even though their attorney did most of the talking during domestic relations mediation led Wissler to surmise that parties' need for voice could be fulfilled through their attorney.²⁹⁰ This explanation was consistent with the procedural justice literature which, according to the commentator Welsh, indicated that effective attorney representation could satisfy party's need for voice.²⁹¹

As for the general civil cases, the mediation outcomes for parties who received substantial preparation for mediation from their attorneys were compared to those for less prepared parties.²⁹² Over half or 57% of the general civil parties were extensively prepared, 37% were somewhat prepared, and 6% had little to no preparation. Compared to less attorney preparation, more mediation preparation from attorneys lowered the probability that parties would experience settlement pressure while elevating the probability that they would settle, were able to tell their story and contribute to the outcome, were respectfully treated by the mediator, considered the mediator as impartial, and viewed the ADR process and settlement to be fair. Learning about mediation from other (non-attorney) sources might diminish parties' inclination to settle or be positive about mediation. For instance, the likelihood of settlement and favorable opinions about mediation was reduced when domestic relations parties

²⁸⁷ Griller et al. (2011, April 15). *ibid.*

²⁸⁸ Wissler (2010), *supra* note 123.

²⁸⁹ Cited by Wissler (2010), *ibid.*

²⁹⁰ Wissler (2010), *ibid.*

²⁹¹ Noted by Welsh (2001), *Making deals...*, *supra* note 18.

²⁹² Wissler (2010), *supra* note 123.

obtained information about mediation by themselves or consulted with court personnel. Using a court brochure to find out about mediation, however, did not affect the probability of settlement. Obtaining assistance before mediating also made settlement less likely in equal employment opportunity cases.²⁹³

Increasing access to justice for minorities by accommodating their needs through ADR:

ADR, as a means of increasing access to justice, is confronted by the challenge of accommodating minorities. According to the commentator, Press, structural features of mediation that fail to address minority needs include informal procedures, discussion through storytelling and emotional expression, and assumed mediator impartiality.²⁹⁴ The informality of mediation procedures provides inadequate protection against bias, possibly by failing to inhibit displays of prejudice.²⁹⁵ Mediator strategies, such as reflecting, encourage parties to expose their stories and feelings which may conflict with privacy and communication norms that are part of parties' personal or cultural values. Mediator neutrality and impartiality may be more aspirational than actual given that all humans, including mediators, are the products of class, culture, belief system, and other circumstances that inform their actions.²⁹⁶ A second commentator, Izumi, observed that mediators might exhibit bias, implicit or explicit, through actions that favor parties who belong to the group with which the mediator is affiliated and disfavor individuals who are not members of that group.²⁹⁷ And so, mediator neutrality would come under threat from a heightened risk of favoritism, not only when mediators engage in evaluation, but also when mediators practice facilitative mediation, which eschews evaluative tactics. Mediator partiality might be operating when the mediator encourages participation by one party and not the other at particular points in the discussion or asks questions that focus on certain topics rather than others.²⁹⁸

ADR supporters respond to these concerns by pointing out the problems that minorities might face in ADR are also present in adjudication.²⁹⁹ The alleged difference in formality between ADR and adjudication may not apply in practice. For instance, small claims court proceedings are seen as more informal and less complex than those in general jurisdiction courts.³⁰⁰ Moreover, ADR has the advantage over adjudication of greater flexibility in adjusting the implementation of its services in response to party needs, including the needs of minority parties. Mediator training can take into account research findings that implicit bias may be reduced by exposure to positive images of

²⁹³ Wissler (2010), *ibid.*

²⁹⁴ Press (2011), *supra* note 27.

²⁹⁵ Press (2011), *ibid.*

²⁹⁶ Press (2011), *ibid.*

²⁹⁷ Izumi, C. (2010, January). Implicit bias and the illusion of mediator neutrality. *New Directions in ADR and Clinical Legal Education*, 34, 71-155.

²⁹⁸ Izumi (2010, January), *ibid.*

²⁹⁹ Press (2011), *supra* note 27; Wissler (1997), *supra* note 42.

³⁰⁰ Wissler (1995), *supra* note 65.

the disfavored group. Since the durability of bias reduction remains an open question, continued, repeated exposure might be advisable.³⁰¹ Expanding the size and diversity of the mediator pool might also increase mediator interactions with members of another group and provide the positive experiences that might reduce implicit bias.³⁰²

The relationship between minority status and ADR has been examined to a limited extent. The relationship between race/ethnicity and ADR monetary outcomes of mediation and adjudication was explored by Hermann and associates in 1993 and by LaFree and Rack in 1996. The 1993 study revealed that the race or ethnicity of parties and of mediators were factors influencing mediation outcomes.³⁰³ Minority parties were found to have the highest satisfaction rates compared to non-minority parties in both mediation and adjudication despite shortfalls in their mediation monetary awards (that is, minority mediating parties received less money as plaintiffs and paid out more money as defendants). The association between award size and minority status became non-significant when the mediators were also minorities.³⁰⁴ The later 1996 study found that ethnicity mattered in mediation but not in adjudication with respect to award size when at least one mediator was non-minority. Under those circumstances, the non-minority mediating party received a larger monetary award.³⁰⁵

The effects of the ADR practitioner's race or ethnicity on parties engaging in mediation or settlement conferences in Maryland were examined in 2016 by Charkoudian and in 2010 by Charkoudian and Wayne. When the race of the ADR practitioner matched the race of one of the parties, a positive impact on that party's voice and control over the outcome was more probable.³⁰⁶ The unmatched party, though, felt less heard by the mediator and experienced less control over the session.³⁰⁷ The absence of any correspondence between the race or ethnicity of the ADR practitioner and that of parties made no difference to either party's satisfaction or feeling understood.³⁰⁸ A large, diverse mediator pool might be helpful for applying these findings to serving the ADR needs of all parties, minority or otherwise.³⁰⁹

³⁰¹ Greenwald, A.G. & Krieger, L.H. (2006, July). Implicit bias: Scientific foundations. *California Law Review*, 94:4, 945-967. Available at

<https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1250&context=californialawreview>

³⁰² Brazil (1999), *supra* note 15; Charkoudian (2016, January), *supra* note 205.

³⁰³ Hermann, M., LaFree, G., Rack, C., & West, M. (1993, January 1). *MetroCourt Project final report: A study of the effects of ethnicity and gender in mediated and adjudicated small claims cases*.

³⁰⁴ Herman et al. (1993, January 1), *ibid*.

³⁰⁵ LaFree, G. & Rack, C. (1996). The effects of participants' ethnicity and gender on monetary outcomes in mediated and adjudicated civil cases, *Law & Society Review*, 30:4, 767-798.

³⁰⁶ Charkoudian (2016, January), *supra* note 205.

³⁰⁷ Charkoudian, L. & Wayne, E.K. (2010). Fairness, understanding, and satisfaction: Impact of mediator and participant race and gender on participants' perception of mediation. *Conflict Resolution Quarterly*, 28:1, 23-52.

³⁰⁸ Charkoudian & Wayne (2010), *ibid*.

³⁰⁹ See Brazil (1999), *supra* note 15; Charkoudian (2016, January), *supra* note 205; Wissler (2011), *supra* note 161.

The court can decide to assume responsibility for responding to parties' need for procedural fairness or access to justice in court-connected ADR irrespective of whether that responsibility is obligatory (due to the connection between court and ADR) or discretionary (due to the incompatibility between party consent and practitioner coercion). Research-based evidence is available to guide the court in applying notions of fairness to the various forms of court-connected ADR – that is, to arbitration, mediation, neutral evaluation, and settlement conferences.

IN SUM: Should the Trial Court seize the opportunity to explore the purpose of court-connected ADR and how to best fulfill that purpose, the evidence presented in the court-connected ADR literature provides a basis for the court's decisions about which goal or combination of goals would be most responsive to the dispute resolution needs of the Massachusetts citizenry and to the court's obligation to deliver justice in meeting those needs as well as which initiatives would be most effective in meeting the chosen goal(s). Considering that "positive [ADR] results are linked to high quality well-resourced programs,"³¹⁰ success in this endeavor would require the court to embrace the value of court-connected ADR and commit to its support.

³¹⁰ Mack (2003) (citing Ward's 1988 summation of general mediation results), *supra* note 5, at 26-27.

Section B: Provider Research Findings and Recommendations

In the spring semester of 2019, MOPC engaged law students from the Harvard Negotiation and Mediation Clinical Program (HNMCP)³¹¹ to assist with the assessment of court-connected ADR and development of strategies to determine how Massachusetts might strengthen court-connected ADR services. The focus of HNMCP's research and the resulting findings and recommendations are limited to court-connected ADR providers. This research forms part of a bigger project being undertaken by MOPC for the Massachusetts Trial Court on improving court-connected ADR services in Massachusetts.³¹² The findings and recommendations discussed below are based upon responses to a survey completed by 34 court-approved ADR providers. A sub-set of these respondents were also interviewed.

Finding 1: The departments of the Massachusetts Trial Court differ in their promotion of court-connected ADR services.

The usage of court-connected ADR varies substantially across the departments of the Massachusetts Trial Court. While much of the variation depends on how each individual judge perceives the value of ADR, there are also some structural patterns in the usage of ADR.

Variation by types of cases

One major division concerns the value and complexity of the disputes handled within a given department. In general, ADR providers working in the District Courts and the Boston Municipal Courts tended to resolve low-value, simple cases, in which the great majority of litigants appear *pro se* and tend to know nothing about ADR before showing up at the courthouse. ADR services tend to be provided on-site at the courthouse and for free. Providers operating in these contexts tended to receive a high volume of cases, and tended to rely on clerks for referrals, noting some substantial variation in how different clerks handled the referral process and educated litigants about ADR. Because these providers generally provided services in court, neutrals needed to be present in court without knowing whether or not they would be referred a case. Where provider organizations had close working relationships with clerks and could have some indication about the available cases, they believed this to be very valuable for managing

³¹¹ The Harvard Negotiation and Mediation Clinical Program (HNMCP) at Harvard Law School focuses on cutting edge work in dispute systems design, negotiation, mediation, and facilitation. Students enrolled in HNMCP work with a client on matters related to negotiation, mediation, and conflict management, in a team of 2 or 3 with a supervisor. Each semester the clinic offers a mix of public, private, domestic, and international projects.

³¹² In Massachusetts, court-connected ADR is governed by the Uniform Rules on Dispute Resolution, which took effect in 1999. As per the Uniform Rules, each Trial Court Department approves listed providers to receive referrals from judges and other court staff for ADR services. Rule 8 sets out qualification standards for the providers, and Rule 9 sets out ethical standards for providers when providing court-connected dispute resolution services. Supreme Judicial Court Rule 1:18: Uniform Rules on Dispute Resolution (hereinafter "Uniform Rules"), Date 5/1/1998. Available at <https://www.mass.gov/supreme-judicial-court-rules/supreme-judicial-court-rule-118-uniform-rules-on-dispute-resolution>, accessed on April 15, 2019.

their neutrals' time.

By contrast, ADR providers working in the Superior Court or the Land Court tended to resolve more complex, high-value cases, in which many litigants had legal representation, and in some contexts their counsel tended to be very knowledgeable about ADR processes and could advise the litigants about their options. Many of these ADR providers provided their services outside of court, and referrals tended to rely on word-of-mouth. Providers working in these contexts tended to perceive judges as being more important for the referral process; some judges were known for promoting the use of ADR, while others were known for rarely encouraging it.

Variation by participation of practicing attorneys as neutrals

Another important division concerns the relationship between local bar associations and provider organizations. In certain Departments, such as the Land Court, provider organizations are well-known to practicing attorneys who can knowledgeably advise litigants about ADR. In others, a substantial number of practicing attorneys also serve as neutrals (often as conciliators) and can draw upon that experience when representing litigants. This contrasts with departments in which relatively few lawyers have much experience with mediation or conciliation, and may be ignorant of or adverse to the use of ADR.

Attorneys can play positive or negative roles in utilizing ADR

While most interviewed ADR providers saw the presence of attorneys in ADR sessions as positively impacting the process, reinforced by 48% of survey respondents (31% were neutral on the matter), this facilitative impact can be understood from many angles. First, attorneys may be familiar with the processes, its goals, and the best conditions for ADR, and may guide their clients to be more integrative and availing of the advantages of ADR. Second, many of these attorneys also have experience serving as mediators and conciliators and will bring the appreciation for collaborative behavior from that role into their role as a litigant's attorney.

Conversely, a minority (21%) of survey respondents noted that at times attorneys for litigants have contributed to positional or adversarial dispositions of clients. Certain providers stated that this could be because certain attorneys may get attached to a certain concept of "winning" for the client, and may also bring a more zero-sum disposition into their practice.

Riskin and Welsh point out this problem in their scholarship. They argue that lawyers may impact the court-oriented mediation negatively when they employ the "same narrow problem definition" that is natural in a formal court setting. They state that even if lawyers have been trained in or appreciate interest-based negotiation, they "tend to employ their habitual lens."³¹³

Alternatively, other providers noted that certain attorneys simply appeared to lack experience and navigated their clients through ADR sessions in a way that was

³¹³ Riskin & Welsh, *supra* note Error! Bookmark not defined., at p. 903.

suboptimal and tended towards positional outcomes. This suggests that the effectiveness of the obligation of attorneys to advise litigants about ADR under Rule 5 of the Uniform Rules may need further review. Furthermore, one provider noted that, particularly in Probate and Family Court, if one client is *pro se* and the other is not, tensions might arise due to concerns about power dynamics or the lack of a level playing field for dispute resolution. While an exceedingly rare phenomenon overall, with certain providers this imbalance represented 50% and even 90% of their overall cases. This could further raise concerns for litigants if the parties have disparate financial and social resources and the perception of unequal representation is seen as exacerbating an already uneven playing field.

Finding 2: The promotion of ADR within courts tends to rely on specific individuals, rather than on institutional supports.

The study reveals that in courts that are relatively more active than their counterparts in ADR, providers believe that individual judges and court staff (especially clerks) led the initiative to promote ADR. In other words, individuals at the court who believe that ADR is beneficial for the court tended to be proactive in talking to the litigants, making them aware of the options available to them, making more referrals for ADR, and promoting “conciliatory justice.”

That said, the providers observed that promotion of ADR based on individual leadership is not sustainable simply because when judges and staff who promote ADR leave, there is not necessarily anyone present at the court who will continue these positive changes.

There are notable exceptions to this as, for example, certain Land Court judges have been able to successfully entrench a pro-ADR culture at the court, which has endured even after the departure of those judges. This is an important perspective to consider in conjunction with the fact that 82% of survey responses cited court staff as an actor that informs litigants and attorneys about ADR processes.

While individual leadership of judges may promote the utilization of ADR in a court, some providers noted that that if judges do not have confidence in usefulness of ADR, it leads to the sidelining of ADR in the said court.

Overall, an observation among many providers was that the personal attitudes of judges and court staff regarding ADR determine the extent to which the court encourages ADR utilization. The ADR culture in a court is more individual leadership-based than institutional.

Recommendation:

Develop consistent institutional mechanisms to promote court-connected ADR in all departments of the Trial Court.

Cognizant of the fact that each department of the Trial Court deals with different cases—and as a result functions differently—on a general level, providers recommend that the departments have some level of uniformity in promoting and utilizing ADR.

- Broadly, they recommended putting in place or improving, mechanisms for

translating judge proactivity for ADR into an institutional culture, so that the promotion of ADR does not depend entirely on individual persons within the court, particularly judges.

- A provider recommended that the “best influencers” and individual leaders should engage in more ADR-related awareness building and education.
- Develop mechanisms to make litigants aware of ADR options as early as possible.

Role of Judges:

In the interviews, the providers noted that the judges play a big role in encouraging the utilization of ADR. Judges are important in making litigants aware of the availability and benefits of ADR in their respective courts. Further, they play a critical role in encouraging clerks and court staff to be proactive in recommending ADR.

Providers noted that judges are the most prominent source from which litigants and attorneys become aware of ADR services, with 85% of responses citing judges as a source of awareness. Judges and court staff, thus, far outstrip all other sources information (including ADR providers at 56%) at the time when litigants are first informed of the workings of ADR.

Providers noted that when judges are proactive regarding the use of ADR, it enhances the degree of awareness-building and visibility of ADR as a recourse for litigants. They described multiple methods by which this passion may translate into increased litigant awareness. This includes judges backing a wider display of information materials at the court, both advertising and detailing ADR, encouraging clerks to be more proactive in litigants, represented and otherwise, to consider ADR as a viable alternative to litigation, thoroughly and consistently extolling the advantages of ADR for litigants at the court, and, most importantly, referring a higher number of cases for ADR processes, such as mediation and conciliation. Each of these various interventions serves to offer litigants, once they arrive at court, a fuller understanding of the workings of ADR as well as its potential advantages and disadvantages compared to litigation.

Scholars have also identified a connection between effective ADR programs and leadership shown by “essential justice system stakeholders,” including judges. Davis et al. cite studies that show that most successful pilot programs have had support from the “higher ranks in the justice system.”³¹⁴ McAdoo similarly echoes the importance of leadership as a powerful signal to other actors, writing: “With a chief judge or justice conveying interest in and support for mediation, attorneys take mediation seriously.”³¹⁵

Role of Clerks:

There was a variety of perspectives as to the dynamics between judges and clerks in the courtroom, and which of the two actors was central to spreading awareness of ADR in the courtroom. While certain providers insisted that clerks drove the process—with one simply stating that “clerks run the show”—others insisted that culture flows from the

³¹⁴ Davis & Turku, *supra* note **Error! Bookmark not defined.**, at p. 64.

³¹⁵ McAdoo, *supra* note **Error! Bookmark not defined.**, at p. 361.

top down, with clerks merely emulating the dispositions of judges, who truly drive awareness.

Others made a distinction between courts, stating, for example, raising awareness at courts such as District Court were clerk-driven but were driven by judges at courts such as the Probate court.

Rule 5 of the Uniform Rules requires clerks to make information about court-connected dispute resolution services available to attorneys and unrepresented parties. It stresses making this information available early.

Role of ADR Coordinators:

Providers noted that some departments had a dedicated go-to “ADR person” with whom they regularly communicated regarding ADR, including referrals. Among those who responded, most providers noted that District Court and Probate and Family Court have a dedicated ADR coordinator. Very few providers noted that they interacted with an ADR coordinator in other courts. In departments where there is a designated ADR personnel, these are court staff who take on the promotion of ADR on top of their regular duties.

Rule 3(d) of the Uniform Rules requires that within every Trial Court department, one court staff member be designated as the dispute resolution services coordinator. Further, the Rule describes the role of the dispute resolution services coordinator as follows:

- To maintain information about court-connected dispute resolution services;
- To assist the public in making informed choices about the use of those services; and
- To develop a system to record and compile data.

While speaking to the effectiveness of ADR coordinators, the providers contextualized their observations, however, by emphasizing that the quality of their experience with ADR coordinators has varied across coordinators at certain times.

A significant number of ADR providers viewed the presence of an ADR coordinator in the court as being helpful in increasing the efficiency of court-connected ADR. Particularly in Suffolk County, ADR providers lauded the presence of specific ADR coordinators at each court, which helps facilitate communication between ADR providers and the court. They noted that the presence of the ADR coordinators improves relations between the court and the provider. ADR providers identified as beneficial the fact they were able to liaise with ADR coordinators in advance of, during, and after ADR sessions.

Recommendation:

Dedicate go-to ADR personnel for all communications between providers and the court on ADR, in all departments and local divisions of the Trial Court.

Providers stressed the importance of having *dedicated* and knowledgeable go-to ADR personnel in all departments and local divisions of the Trial Court to streamline the efficiency of interaction between the court and the providers while respecting specific local needs.

- About 86 percent of participants in the survey agreed that the presence of an ADR coordinator at the court is important for their capacity to deliver quality court-connected ADR.
- Most recommended that there should be a dedicated and knowledgeable ADR court personnel in each court. These personnel should be identifiable and accessible and carry out all functions related to ADR, such as providing awareness, liaising with the providers, and building a bridge between the court, litigants, attorneys, and the providers.
- Considering the above, courts may hire individuals to work exclusively on promoting utilization of ADR and serve as a source of information about all court-connected ADR.

Finding 3: Providers have focused on improving access for litigants, and see room for the court to improve litigant awareness of ADR. However, providers struggle to obtain reliable data from litigants to evaluate their services.

The study found that providers have made considerable progress in making their services available to a wider array of litigants with improvements about income, physical ability, and transportation constraints. However, providers have little reliable data to evaluate their services from the perspective of litigants.

Fee waivers as a means to increase access

Providers acknowledged that fees could be a barrier to access for low-income litigants. Further, they noted that providing services pro bono, or when a fee is charged, full or partial waivers for low-income and indigent litigants can enhance access. To do so, most providers offered a system of waivers and sliding scales to accommodate those with fewer financial resources. This includes, for example, waivers of entire fees of up to \$300 per hour, or sliding scales reducing costs from \$350 per hour to as low as \$25 per hour depending on financial ability.

An important exception to this general tendency to provide full or partial waivers to litigants involves land and real estate cases. In these cases, several providers either charge full fees or only provide partial waivers. Even so, providers have found workarounds to accommodate indigent clients. This includes encouraging real estate-related cases of small values to be filed in small claims court, or providers declining to charge indigent litigants for certain additional hours spent by ADR professionals in handling a matter.

ADR providers also touched upon less acute barriers for which they had made provisions. Regarding accessibility, several private off-site ADR providers that also provide a court-connected ADR service have adapted their premises to improve accessibility for people in wheelchairs and people with different physical abilities. Also, in relatively large, rural counties such as Berkshire County, certain ADR providers have

furthermore provided for telephonic mediation where the burden on parties to physically present themselves proves too prohibitive. Difficulties in litigant access to transportation remain, however, a barrier to access within court-connected ADR.

While there is a wide-ranging system of waivers across ADR providers, these systems can still be more widespread and more robust to further empower a wider range of people to have recourse to ADR as a practical solution to their disputes. As a practical matter, this could take various forms, including adjusting sliding scales such that a wider range of lower income litigants is eligible for lower charges and also widening eligibility for full as opposed to partial fee waivers. Currently, for example, while 26% of providers charge fees, only 33% of fee-charging providers offer full waivers. Such improvements, however, could raise concerns of additional costs, particularly for providers that do not realize large profit margins.

Rule 1(b)(iii) of the Uniform Rules provides that dispute resolution services should be available to all members of the public regardless of their ability to pay.

Process Adaptations to Accommodate Litigant Needs within ADR Sessions

Additionally, a sizeable number of providers spoke to process adaptations they were able to make to meet specific needs of litigants within ADR sessions, particularly in mediations. These included modifications in cases which raised concerns pertaining to harassment, assault, sexual harassment, assault, and Title IX-related issues. Certain providers noted that they made these adjustments in various ways: for example, by preventing the litigants from being in the same room, communicating with them through a system of “shuttle diplomacy,” and increasing security where needed. Particularly in mediations, providers emphasized that adaptations were made to protect the integrity of self-determination, neutrality and informed consent, consistent with the Uniform Rules.

Further, some providers noted that they attempted to overcome other barriers such as special language and accessibility needs of the litigants, mental health or substance abuse concerns, etc. In addition, particularly in large counties and disputes for which in-person resolution may not be necessary, more courts and providers could take up telephonic mediation as a viable accommodation.

Challenges with on-site facilities

On-site providers noted logistical challenges in providing services at the court. Some of them noted that they often provided services in cramped or otherwise inadequate surroundings. In busy courts, maintaining privacy was a challenge, given the heavy flow of people.

Twenty percent of survey respondents recorded dissatisfaction with the rooms in which they provide their services. Seventeen percent of providers expressed dissatisfaction with the provision of translators at the court. Providers noted that the role of translators is critical in ensuring self-determination and ensuring informed consent.

Recommendation:**Strengthen support for providers who deliver services at the courthouse.**

Most of these aforementioned issues with court ADR are structural. Due to resource, building, and financial constraints, the courts may very well find themselves constrained in their capacity to provide exclusive and adequate spaces for ADR providers to deliver their services while at the court. They may be similarly constrained in engaging a larger roster of translators. Nonetheless, the study reveals a long term interest among providers for the Trial Court in endeavoring to offer additional and more appropriate ADR spaces for providers at court as well employ a larger roster of translators.

Litigant awareness remains low

Many providers stated that the level of awareness among litigants before entering the courtroom is low. They remarked consistently that litigants enter the court with “next to no” information about ADR. Providers stated that litigants almost always only learn about ADR once they arrive at the court.

This is reinforced in the survey data, where only 20% of respondents believed that litigants understand how ADR works when they first arrive at court, as opposed to the 50% of respondents who believed this was not the case. This may also reflect the reality that in some courts most litigants are *pro se*, while in others most litigants have counsel—and in some departments counsel tend to be quite knowledgeable about ADR.

Recommendation:**Make litigants more aware of ADR as early as possible.**

Litigants should be given more information about ADR as an option available to them. The earlier they become aware, the better. While presenting ADR as an option to litigants, especially in written documents and forms, ADR should be explained in more detail.

Providers offered concrete suggestions as to how to increase pre-court awareness of litigants. Firstly, while many courts provide litigants with paper materials before going to court which mentions ADR as a recourse (mainly mediation), a concern across multiple providers was that these materials do not explain what mediation, or the relevant ADR type is. Only 32% of providers felt that materials distributed with court filings play an informing role.

Providers suggested that, either within or accompanying these materials, there should be a description as to what mediation is and how it works. Over 80% of survey respondents felt that the court had an important role to play in providing such information before litigants arrive at the court, such as by including a few paragraphs in the materials explaining the ADR service as opposed to merely naming it. This would put forward the typical time at which litigants become substantively aware of ADR to before arrival at the court.

Educating litigants early on about ADR can enhance its effectiveness. When litigants are encouraged to consider ADR as early as possible, they can save time and money by enhancing the chances of achieving a mutually-acceptable solution.³¹⁶ Information at an early litigation stage or even early referral can prove critical to the success of court-approved ADR service providers.³¹⁷

Providers do not have effective practices to obtain high-quality data regarding litigant experiences

Providers recognize the importance of obtaining feedback from litigants and their attorneys. However, practices for obtaining feedback vary, and few providers believe that they are as effective at collecting feedback as they would like. Some providers send evaluations after some time has elapsed since the last session while others offered evaluation forms immediately after the end of the process when the litigants are still available to be contacted immediately. Many interviewees who noted that they offered evaluations immediately observed a higher rate of response. Many providers stated that they distribute questionnaires at the end of ADR sessions to collect feedback from the litigants. Providers also used telephone calls, mailed questionnaires, and conducted online surveys.

- Over 70% of ADR providers send questionnaires to litigants after ADR sessions as a means of evaluating their services, with relatively low rates of questionnaires returned to the providers.
- Twenty percent of providers surveyed obtain evaluation and feedback over the telephone.

In general, response rates are low. Providers noted that less than 50% of litigants/attorneys provided feedback, with many reporting far lower response rates. While providers expressed interest in obtaining better feedback, few had any concrete ideas for how to do so.

Providers could consider offering litigants multiple means of evaluation in order to maximize chances of a response. For example, providers could leave an option for online submission of feedback, with online response functionalities added to their websites. Currently, only 7% of providers surveyed have such a function, which, in tandem with the other options could offer a robust framework for feedback and improve the quality of responses.

Rule 7(a) of the Uniform Rules states that every provider shall evaluate its neutrals on a regular basis” and that “settlement rates shall not be the sole criterion for evaluation.”

Providers recognized that it is important to use participant feedback to continually evaluate their offerings and the effectiveness of the neutrals on their roster. Several providers mentioned that they had eliminated neutrals from their rosters who had not

³¹⁶ Rau et al., *supra* note **Error! Bookmark not defined.**, at p. 587.

³¹⁷ *Ibid.*

been deemed effective, though these generally seemed to be exceptional circumstances.

As for the question of how they measure success, ADR providers noted that they looked at both the settlement rates and feedback received from litigants. Given that less than 50% of litigants/attorneys give feedback, measuring success through participant feedback continues to be a challenge. Evaluation on the basis of settlement rates raises other problems, as the scholarly literature urges caution in making settlement rates the appropriate criterion for measuring success given that not all cases *should* settle.³¹⁸

Recommendations:

Create a study panel to study effective ways of measuring success and improving evaluation systems.

Based on the interviews and surveys, the researchers noted that a focused study on different ways of measuring success and how to improve existing systems should be carried out. In particular, methods to improve response rate should be studied. This recommendation is consistent with the courts' duty, under Rule 6(g) of the Uniform Rules, to compile data regularly to track cases and monitor services, and with providers' duty, under Rule 7(a), to continually evaluate their programs.

Finding 4: Providers depend upon individual relationships and professional networks to get cases, creating barriers to entry for new professionals from more diverse backgrounds. Providers are less diverse than the populations they serve, with consequences for the profession and for the public at large.

Providers are not as diverse as they would like, and they struggle to remedy this.

Many providers identified a lack of diversity within their rosters. Despite serving communities of diverse racial, cultural and socio-economic backgrounds, the roster was disproportionately white and included individuals from a relatively higher income group who were more advanced in their careers.

This could be due to several causes:

- First, because referrals are largely given to providers who have many years of experience, and stronger connections and networks within the court, racial minorities, and newer diverse providers have barriers entering the space.
- Second, many organizations rely on volunteers to provide services for free. The volunteers tend to belong to a relatively higher income group to be able to forgo paid work, and generally have many years of experience. Consequently, most of

³¹⁸ See *supra* notes **Error! Bookmark not defined.**–**Error! Bookmark not defined.** and accompanying text.

the volunteers represent privileged white communities, including many who are quite advanced in their careers.

- The research revealed that many providers did not have a single racial minority practitioner on their roster.

One of the most profound and consistent concerns revealed by this research is that across all counties, ADR types, and courts, an acute diversity problem is present among the ADR providers. The rosters themselves tend to be skewed towards predominately white, predominately higher-income professionals while the ADR professionals on those rosters who get a disproportionately high number of referrals also tended to be older, male, white, and higher income. The diversity problem can be understood as falling into roughly two main areas for analysis: on the one hand, factors involving seniority bias and, on the other, factors involving sociocultural/racial bias.

Seniority/age bias

With one ADR provider summarizing the seniority/age dynamic as “the big names are the big players,” there seems to be a barrier to entry for newer actors both at the provider and the individual professional level. At the level of the provider, many providers indicated, and the survey data confirmed, that older ADR providers disproportionately tended to get many more referrals when compared to very recently established ADR providers. This was seen to be due in large part to the importance of informal relationships and long-term exposure between ADR providers and professionals on the one hand, and ADR providers and judges on the other. This dynamic is replicated within provider organizations where, on the individual level, it was observed that it is difficult for newer (and more diverse) mediators to get ADR experience since providers identified reputation and experience as factors that lead to referrals. Therefore, new practitioners faced a barrier to entry due to their difficulty building a portfolio because they do not have a portfolio already built. On both levels, this might be described as an incumbency bias.

The reputational and experiential logics of judge referrals have tended to lead to a disproportionately high concentration of referrals to veteran ADR professionals and long-established ADR providers because informal referrals from judges play an important role in how ADR providers get cases: around half of survey respondents describing the judge’s role as “indispensable” in this regard. While certain long-established ADR providers take on hundreds of cases per year, there are recently established ADR providers that have had *zero* referrals in their court-connected practice, despite providing the same type of ADR and meeting the qualifications for inclusion on the list of approved providers. One ADR provider described this dynamic as an “old boys network.”

Some providers rely on volunteers to provide day-of-court, on-site dispute resolution services. While these services do not implicate the same seniority bias, as referrals are automatic, volunteers tend to come from wealthier backgrounds or tend to be well-established in their careers.

Socio-cultural/Racial Bias

Partly in light of the above barriers to entry, which tend to favor a disproportionately white, male class of senior ADR professionals in the state, the ADR profession has a pronounced racial and sociocultural diversity problem. Despite the diversity of racial, income and cultural backgrounds in Massachusetts, there was a stark and consistent lack of such diversity reflected in the roster of ADR professionals within provider organizations. Several ADR providers appeared embarrassed to share that their team was, in fact, all white and generally of a higher income, and admitted that while they wanted to diversify their rosters they did not know how to do so effectively. Professionals with lower income levels were also systematically underrepresented due to certain structural factors. Insofar as many ADR professionals work as volunteers and thus forego income during the time in which they work, the result is that those individuals who cannot forego income or time out of work are underrepresented. As a result, many of the ADR professionals may not have similar economic life experiences to those for whom they serve. There is also a clear intersectional perspective in this problem since populations with lower incomes tend to be racial, ethnic and religious minorities, and may involve additional factors relating to gender.

Rule 7(b) of the Uniform Rules requires providers to actively strive to achieve diversity among staff, neutrals, and volunteers.

Further, it mandates sensitivity to the diversity of the communities served. Relevant factors to be considered include languages, dispute resolution styles, and ethnic traditions of communities likely to use the services.

Not having staff who better reflect the diversity of the communities they serve can be seen as reducing the quality of ADR services due to a lower appreciation of the cultural and experiential understandings of litigants. This could also reduce litigants' trust in ADR providers as the latter are perceived to be removed from their communities.

The reliance on a small subset of qualified ADR professionals to handle referrals has implications for how providers administer their programs. Some professionals are exceedingly busy while others have a significant capacity to expand their court-connected work. Furthermore, the shortage of diverse professionals limits opportunities for mentorship of the next generation.

Recommendations:

Create a study panel to study the status of diversity.

A study panel should review the status of diversity in court-connected ADR providers, and make a recommendation for including diversity as appropriate. The study panel should also study the root causes of the problem. This would help providers meet their obligations under Rule 7(b) of the Uniform Rules, and would strengthen the commitment to diversity in Rule 1(b)(vii) of the Uniform Rules.

Promote inclusion throughout the court-connected ADR process.

Rule 1(b)(vii) of the Uniform Rules makes clear that diversity is a guiding value of court-connected ADR. Diversity in the ADR profession should be celebrated and encouraged. Inclusion can be fostered throughout the system. This begins with rigorously collecting data on diversity, and working with providers to strengthen diversity programs. Under Rule 6(g) of the Uniform Rules, the court shall, in collaboration with the providers to which it refers to cases, develop a system to record data and monitor services. Under Rule 7(a) of the Uniform Rules, providers have a duty to monitor and evaluate their services. Consistent with Rule 7(b), providers should be encouraged to promote diversity in staff, neutrals, and volunteers. In that light, courts may require ADR providers to produce an “annual diversity report” to map challenges and promote effective practices.

Consistent with Rule 6(a) of the Uniform Rules, courts should make reasonable efforts to distribute referrals fairly among providers by keeping diversity and inclusion as central to their decision. Inclusion in terms of gender, sexual-orientation, race, income, religion should be especially considered.

There may also be opportunities to increase funding for diversity initiatives. Volunteer incentives, fellowships, stipends may be provided to encourage young professionals from diverse backgrounds to encourage entry into the field.

Finding 5: There is an uneven distribution of court-referred ADR cases among providers: some have plenty to handle while others are underutilized. Continued public support of ADR would assist providers in their strategic planning.

Much of the uneven distribution of court-referred ADR cases depends on the reputation-driven nature of the referral process in certain departments of the Trial Court. However, the volume of referrals also depends upon the attitudes toward ADR of the judges and clerks who make referrals. When staff relocate or retire, case referrals can increase or decrease significantly, making it difficult for providers to plan for the long term. Furthermore, the availability of public funding also directly affected the volume of referrals from the court. Importantly, many survey respondents felt they could handle some degree of an increase in court referrals overall, with many providers answering that they could adequately take on a 100% increase in referrals.

Funding plays a fundamental role in the ability of ADR providers to appropriately staff their rosters and ensure sufficient capacity for service provision. All non-fee charging providers rely on grants and funding from public institutions such as the MOPC and the Massachusetts Legislature. Some providers cited direct proportionality between the availability of public funding and their capacity to provide ADR services to the public.

Furthermore, nearly 50% of respondents agree “strongly,” with a clear majority agreeing in some degree, that funding from the Massachusetts Legislature and other Massachusetts public institutions is crucial for their continued work. This reveals that

going forward continued interest and consistent funding from the Massachusetts Legislature will be crucial to maintaining the gains in court-connected ADR service provision in the state and allowing for further improvement in the future. Consistent funding and financial support are key to the success and sustainability of mediation programs.³¹⁹

Recommendations:

Scale up funding to enhance access.

Providers noted that funding is important for both the providers and for courts to improve accessibility and quality of services provided. In that light, providers recommend more funding:

- To support providing ADR to low-income, vulnerable, and disadvantaged litigants;
- To improve the quality of services provided;
- To hire dedicated and knowledgeable ADR personnel in courts;
- To increase awareness through informational materials;
- To provide logistical support to the providers;
- To enhance the ability of the providers to accommodate special needs regarding accessibility;
- To enhance the ability of the providers to take up more referrals, and develop their capacity to provide services;
- To attract volunteers from diverse backgrounds and income levels by providing fellowships, internship opportunities; and
- To help new ADR professionals break through entry barriers.

Make improvements to the system of referral.

Overall, providers noted that courts should make more ADR referrals. In that light, and consistent with the Uniform Rules, it is recommended that:

- Courts should promote the utilization of ADR by making more referrals, and by distributing them fairly among providers on its list, taking into account geographic proximity, subject-matter competence, special needs of the parties, and fee levels.

Summary of Implications for Awareness, Access and Utilization

In sum, providers perceived the judge to be the primary actor in raising awareness of litigants about ADR and how it works. Due to the inconsistencies that might result in placing so much of the responsibility for **raising awareness** in one actor, suggestions for

³¹⁹ UNDP, PROGRAMMING FOR JUSTICE, *supra* note **Error! Bookmark not defined.**, at p. 5.

improvement focused on providing awareness for litigants about ADR before they reach the court, strengthening the mechanisms by which judges' enthusiasm for ADR translates into institutional culture at the courts, thereby outlasting judges' tenures, and streamlining and reinforcing the role of the ADR coordinator across all courts.

In the realm of **access**, ADR providers have been very satisfied with their efforts to increase access to ADR services for low-income individuals, and those with specific physical or transport needs. However, providers are also aware that more progress can and should be made across these measures. Furthermore, while ADR providers have been able to identify a diversity problem with a roster of disproportionately older, white and higher-income class of most-active ADR professionals, they find it difficult to outline what specific measures and reforms may serve to substantively increase diversity. This study has offered suggestions as to where the reform process may begin. Future research specifically related to diversity in ADR could further help confront this issue.

Finally, owing to the specificity of utilization across factors of geography, community demographic, court type, ADR type and specialization of ADR providers, there was generally less harmony among the perspectives of providers regarding utilization. A critical finding revealed across the cases, however, is that more public funding of ADR-related court infrastructure would enable courts to support ADR providers' services by enabling better logistical support as well as allowing ADR providers to make their process more adaptable to specific litigant needs.

Section C: A Review of Effective Practices from Other States

The focus of this section is on examination of effective practices relating to *awareness*, *access*, and *utilization* of alternative dispute resolution (ADR) in the state court systems of Florida, Maryland, and Rhode Island. Also highlighted are effective practices currently being implemented here in the Massachusetts Trial Court System. These three state court systems were chosen, in part, because of the transparency of each of their respective systems. This transparency speaks to all three of categories mentioned above, not only for ease in research on court-connected ADR in these states, but also for the ability of the public to access and utilize it.

Outreach via website and court personnel

All three of these states' court-connected alternative dispute resolution (ADR) programs have robust websites that are easily navigated with simple-language descriptions. They either utilize one universal ADR website, or each court division has their own ADR website (Maryland and Rhode Island) that is tailored to their court's unique needs, or they have both (Florida). They are easy to navigate with telephone numbers, web links, or email addresses depending on what the public is searching for. There are drop-down menus that link to—for example: court hours and times that free mediation or lawyer-for-a-day conciliation programs are offered in specific court locations, and information on court-connected ADR in general. Their websites list both court and local resources litigants might be searching for, including services such as links to accessing interpreters. Anything that is related to court-connected ADR is usually accessible on all three states websites.

The use of videos and links to videos increases access, awareness, and utilization either by having links on the court-connected ADR website or in courthouses specifically. For example, some states have a video played before the call to inform litigants about the benefits of ADR. On the court-connected ADR websites, the videos are varied and informative. Some examples are: what to expect at mediation; eviction notices; information for pro se parties; family court guides to court-connected mediation; and small claims and mediation.

In courthouses, the use of videos augments rather than replaces the one-on-one contact with litigants in better understanding court-connected ADR. People are helped in the clerk's office where information is also provided about ADR. Pamphlets and literature readily available at these offices are also beneficial to provide more in-depth information about court-connected ADR. Some courthouses offer videos—like Norfolk Probate and Family Court in Massachusetts.³²⁰ A video on court-connected ADR is played in the courthouse on a continuous loop for the public, parties, and attorneys to view.³²¹ Additionally, research shows that when a person in authority discusses ADR

³²⁰ MA Trial Court (2018). Unpublished internal Massachusetts court record. Accessed March 14, 2019.

³²¹ This parenting video is played on a continuous loop outside of the court's registry office.

Massachusetts Council of Family Mediation. (2016, July 13) *Alternative Dispute Resolution: Option &*

with litigants, they are more apt to try it as an option. This is done in most of the Massachusetts District Courts, small claims division via the use of the bench cards.³²² The other six Massachusetts Trial Court Divisions utilize bench cards as well. If an adjudicator, from the bench, discusses the benefits of ADR to litigants, it is often times better received by the parties than any other forms of court-connected ADR awareness.³²³

While conducting this research, it is important to note that Rhode Island had easy-to-reach court-connected ADR personnel via the use of a telephone, the best of all the three benchmarked states. This speaks directly to access—and is an important consideration in the ease for litigants to get answers to specific questions regarding court-connected ADR without having to physically go to a courthouse, when the website might not have enough in-depth information on a specific topic, or when a litigant does not have internet access. Studies show that only 58% of senior citizens and 54% of adults living with a disability use the internet.³²⁴ There is also a disparity between utilization of the internet and income. Statistics show that 74% of households that earn less than \$30,000 per year use the internet, as compared to 97% of United States households that earn greater than \$75,000.³²⁵ Having phone lines staffed with direct telephone numbers makes it easier for litigants, and the public at large to access and utilize court-connected ADR services.

Satisfaction surveys: Sharing data on ADR effectiveness and beneficial results

Another factor that was benchmarked was satisfaction surveys for participants. This speaks directly to access, awareness, and utilization in two ways. First, there is transparency in how people utilizing ADR in the courts feel about their experiences. And second, it is shared with the general population, especially because overall, people view court-connected ADR (particularly mediation) favorably.³²⁶ In a study Maryland Courts had conducted upon itself, the published report stated with regard to criminal misdemeanor cases and court satisfaction:

Participants who developed a negotiated agreement in ADR were more likely to be satisfied with the judicial system than others, while participants who reached negotiated agreements on their own [without ADR] were not more likely to be satisfied with the judicial system than those without negotiated agreements...This seems to imply that the process of reaching an agreement in

Benefits [Video file]. YouTube Video. Retrieved April 19, 2019, from <https://www.youtube.com/watch?v=ufKI3vjKwJs&feature=youtu.be>.

³²² MA Trial Court (2018), *supra* note 320.

³²³ Shestowsky (2017, Spring), *supra* note 113.

³²⁴ Shestowsky (2017), *ibid*.

³²⁵ Shestowsky (2017), *ibid*.

³²⁶ Eisenberg (2016), *supra* note 81.

ADR is the factor that led to higher satisfaction, rather than just the process of having negotiated a settlement.³²⁷

Maryland has links to litigants' satisfaction surveys as well as the court's own self-studies and evaluations on their court-connected ADR websites, making it especially easy to access this information.

Community Outreach

There are inexpensive ways to increase awareness and utilization of court-connected ADR through community outreach. For example, in Maryland, courts hold a Conflict Resolution Day Bookmark Art Contest in schools. Last year, over 1,800 students participated statewide in the bookmark contest to mainstream court-connected ADR by introducing students and their families to this process. This is a low cost, effective approach to introduce court-connected ADR in a novel, non-threatening manner—and helps to normalize the concept for children and their families.³²⁸ During Conflict Resolution Week in October 2017, the Massachusetts Bar Association's Dispute Resolution Section sponsored, along with the Massachusetts Juvenile Court Department, a panel discussion that focused on youth mediation and juvenile justice that was a free event for community members on the North Shore.³²⁹ Holding events such as this one, helps to integrate—and mainstream ADR processes in communities.

Other Strategies

A tangential strategy to increasing access, awareness, and utilization of court-connected ADR is to incorporate mediator excellence programs. Maryland and Florida have rigorous standards for court-connected mediators. In Florida, for example, court-connected mediation is based on a point system and licensure. Mediators need a minimum of 100 points to qualify to mediate in their courts—which includes metrics such as level of education and experience. A master's degree in conflict resolution or a juris degree—each add 30 points towards the 100 points needed to practice. Examples of earning the additional 70 points are: supplemental mediation training; mediation experience; and practicing mentorship. Licenses are required to be renewed every two years. In addition, there is a Mediator Qualifications and Discipline Review Board, Mediator Ethics Advisory Committee, and The Alternative Dispute Resolution Rules and Policy Committee.³³⁰ A similar system is in place in Maryland called Maryland Program for Mediator Excellence.³³¹ Having rigorous standards in place for court-connected

³²⁷ Charkoudian, L. (2016, September). *Impact of mediation on criminal misdemeanor cases*. Administrative Office of the Courts, Maryland Judiciary. Retrieved May 10, 2019, from <https://www.courts.state.md.us/sites/default/files/import/courtoperations/pdfs/criminalcourtimpacttwo-pagesummary.pdf>.

³²⁸ Maryland Judiciary. (2018, September 24). *Judiciary Contest Promotes Peacemaking Through Student Artwork*. Retrieved April 10, 2019 from, <https://www.mdcourts.gov/media/news/2018/pr20180924>.

³²⁹ MA Trial Court (2018), *supra* note 320.

³³⁰ Florida Dispute Resolution Center, Florida Trial Court (2018, March). *Florida rules for certified & court-appointed mediators: Code of ethics*. Tallahassee, FL. Retrieved May 15, 2019, from <https://www.flcourts.org/content/download/216763/1966524/rules-certified-court-appointed-mediators.pdf>.

³³¹ MACRO. (2019). *Maryland Program for Mediator Excellence*. Maryland Judiciary. Retrieved May 15, 2019, from <https://mdcourts.gov/macro/mpme>.

mediators helps to ensure that the quality of mediation is uniform across a state's trial court system.

Centralizing court-connected ADR appears to help streamline the process, and additionally, speaks to increased utilization, efficiency, and cost saving. The Maryland Mediation and Conflict Resolution Office (MACRO) is considered a dedicated, integral component of their judicial system and works collaboratively with the courts. They are, among other things, responsible for managing the Maryland Program for Mediator Excellence as well as the Conflict Resolution Day Bookmark Art Contest mentioned above. With ADR being an intrinsic part of their court system there is a potential for greater cooperation to be practiced between the court and their ADR office.³³²

Problem-solving, multi-door courts are valuable to a state's court system, and their approach is more holistic in nature. They have their roots in restorative justice and approach litigation in a non-adversarial way. Here in Massachusetts they are called "Specialty Courts" and there is a program in Hampshire Probate & Family Court.³³³ As in Florida, the judge is part of a "problem solving team", as is a mediator, mental health professional among other team members. In Massachusetts these programs are free, voluntary, and provide "divorcing and separating parents the opportunity to resolve their differences in a child-centered way and with less conflict".³³⁴ In Florida these problem-solving courts are utilized in adult and juvenile drug, mental health, veterans, early childhood, and permanency courts. Florida has 170 specialized courts like the ones mentioned *supra*.³³⁵ The results show reduced recidivism rates and greater compliance with court orders. Additionally, utilizing this approach to justice has been shown to promote confidence and satisfaction with the justice system process.³³⁶

Mandatory mediation is becoming more popular in trial court processes. Mediation, as well as other forms of court-connected ADR, is mandatory in Florida courts.³³⁷ It is also mandatory in some of Maryland's and Rhode Island's courts as well. For example, all child access and custody cases in Maryland require court-connected mediation.³³⁸ Making mediation and other ADR processes mandatory allows them to "become core components of the judiciary and integrated into the litigation process."³³⁹ It should be noted that mandatory court-connected mediation programs do not force parties to a resolution—they simply require both parties to come to the table to discuss

³³² MACRO (2019). *Welcome to MACRO*. Maryland Judiciary. Retrieved May 15, 2019, from <https://mdcourts.gov/macro>.

³³³ Mass.gov. (2019). *Other specialized court sessions*. Retrieved May 15, 2019, from <https://www.mass.gov/service-details/other-specialized-court-sessions>.

³³⁴ Mass.gov. (2019), *ibid*.

³³⁵ Florida Trial Court. (2018). *Problem-Solving Courts*. Tallahassee, FL. Retrieved June 1, 2019, from <https://www.flcourts.org/Resources-Services/Court-Improvement/Problem-Solving-Courts>.

³³⁶ Florida Trial Court (2108), *ibid*.

³³⁷ Florida Trial Court. (2018). *Mediation in Florida*. Tallahassee, FL. Retrieved May 15, 2019, from <https://www.flcourts.org/Resources-Services/Alternative-Dispute-Resolution/Mediation-in-Florida>.

³³⁸ Eisenberg (2016), *supra* note 81.

³³⁹ Eisenberg (2016), *ibid.*, 245.

the option. This is also the case in Massachusetts Trial Court's only mandatory mediation program in the Probate and Family Court in Hampden.³⁴⁰

Funding and cost to litigants of court-connected ADR

In Florida, on July 1, 2004 the government decided that funding for the State Court System would become the responsibility of the State. "The goal was for litigants to have generally uniform access to 'essential' services regardless of where they live in the state. Included among those 'essential' services are court-connected mediation and arbitration."³⁴¹ The ADR funds are collected and put in a statewide trust and linked to the state's budget.³⁴² This approach to court-connected ADR funding directly links to equal access for all of Florida's citizens. Generally, litigants in Florida are responsible to pay a portion of the court costs (there are various exemptions to this rule) and mediators are paid for their work.³⁴³ In Florida, tying court-connected ADR to the state budget allows for consistency and reliability of funds allocation, which in turn creates stability in the system. In Rhode Island, in the Family and District Courts, mediators are paid for their work, though it is free to participants, and is funded through the Rhode Island Judiciary.³⁴⁴ Rhode Island's fiscal budget was readily available online, transparent, and the court-connected ADR expenditures were easy to locate therein.³⁴⁵ Additionally, Rhode Island also requires mandatory arbitration in Superior Court. The parties are required to pay a \$400 arbitration fee that is paid to the arbiter for their court-connected work on the case.³⁴⁶

Findings and recommendations

The three benchmarked states: Rhode Island, Florida, and Maryland all utilize, to different degrees, the best practices described above. While some practices in Massachusetts were cited as examples of implementing some of these effective practices, they are not the norm in the Massachusetts Trial Court System. For example, In Rhode Island mediation or arbitration is mandatory in their Supreme, Superior, and Family Courts. It is voluntary, free, and available in their other two divisions—District and Workers' Compensation Court.³⁴⁷ In the Massachusetts Trial Court ADR is not

³⁴⁰ MA Trial Court (2018), *supra* note 320.

³⁴¹ Florida Trial Court. (2018). *About ADR & mediation*. Tallahassee, FL. Retrieved May 30, 2019, from <https://www.flcourts.org/Resources-Services/Alternative-Dispute-Resolution/About-ADR-Mediation>

³⁴² Florida Trial Court. (2018), *ibid*.

³⁴³ Eleventh Judicial Circuit of Florida. (2019). *Frequently Asked Questions for Circuit Court Mediation*. Miami, FL. Retrieved May 20, 2019, from <https://www.jud11.flcourts.org/Frequently-Asked-Questions-for-Circuit-Court-Mediation>.

³⁴⁴ MA Trial Court (n.d.). *NE ADR*. Unpublished internal Massachusetts court record. Accessed June 8, 2019.

³⁴⁵ State of Rhode Island and Providence Plantations. (2018) *State of Rhode Island and Providence Plantations Fiscal Year 2018 Budget. Volume IV – Public Safety, Natural Resources and Transportation*. Retrieved May 22, 2019, from http://www.omb.ri.gov/documents/Prior%20Year%20Budgets/Operating%20Budget%202018/BudgetVolumeIV/3_Judicial%20Department%20-%20Constitution.pdf.

³⁴⁶ MA Trial Court (n.d.), *supra* note 344.

³⁴⁷ MA Trial Court (n.d.), *ibid*.

mandatory in any of the seven divisions, with the exception of dispute intervention in the Housing Court and Probate and Family Court Divisions along with the single pilot project mentioned *supra* in Hampden Probate and Family Court Division.³⁴⁸

In Massachusetts, there is one court department—the Housing Court – that utilizes a mediation approach known as dispute intervention on a regular basis in all five of its divisions as a means for administering justice, that is free for litigants. Because of its successful utilization of court-connected ADR as its primary method of resolution it bears mentioning in the conclusion.³⁴⁹ The Housing Court is unique in the state of Massachusetts in that it devotes a portion of its annual budget to “Housing Specialists”.³⁵⁰ Housing Specialists are trained in the techniques of dispute resolution, pursuant to S.J.C. Rule 1:18.³⁵¹ They are also trained on the applicable rules as well as landlord-tenant law and the building, sanitary and other applicable codes.”³⁵² Additionally, annually they report an over 80% success rate on cases that “are referred to mediation and successfully resolved”.³⁵³ Another benefit of utilizing ADR as the primary form of resolution is the efficiency and speed in which the matters are resolved vis-à-vis adjudication.³⁵⁴ Given the studies that cite increased satisfaction—both with the courts, the process, and personally,³⁵⁵ it makes sense to incorporate court-connected ADR as part of the Massachusetts Trial Court System—as the Housing Court Department does—rather than simply utilizing it as an alternative option.

In a recent Massachusetts Trial Court Personnel Survey (2019) conducted by the Massachusetts Office of Public Collaboration (MOPC) a majority of the respondents thought a dedicated court-connected ADR website that included links and dropdown menus for videos, forms, surveys, and other materials, (such as: days and hours mediation and/or conciliation is available—as well as the locations; translation services; pamphlets and brochures; and lastly telephone numbers that connect directly to the department needed to be reached) would be “effective” or “somewhat effective” to help raise awareness, access, and utilization for parties and attorneys. Tangentially, the same survey also asked if it would be useful for litigants’ and attorneys to know about availability of court-connected ADR earlier in the process. A vast majority thought this would be valuable. In the same survey the question was asked if literature is needed to explain ADR to litigants’ either before they come to court or at court: almost all respondents thought this information should be made available to parties before court, a majority thought it should be explained at court as well. Additionally, the question was asked, “which of the following would be most useful to increase the use of ADR in your

³⁴⁸ MA Trial Court (2018), *supra* note 320.

³⁴⁹ MA Trial Court (2018), *ibid*.

³⁵⁰ MA Trial Court (2018), *ibid*.

³⁵¹ See uniform rules on dispute resolution: MA.gov. (2003, November 20). Uniform dispute resolution Rule :8 Qualification standards for neutrals. Retrieved June 27, 2019, from <https://www.mass.gov/supreme-judicial-court-rules/uniform-dispute-resolution-rule-8-qualifications-standards-for>.

³⁵² MA Trial Court (2018), *supra* note 1.

³⁵³ MA Trial Court (2018), *ibid*.

³⁵⁴ MA Trial Court (2018), *ibid*.

³⁵⁵ Eisenberg (2016), *supra* note 81.

court”? Almost all of the respondents said, “earlier notification about availability of ADR to litigants/attorneys” would be “very useful” (the majority) and “somewhat useful”. This information helps buttress the argument that a robust court-connected ADR website would be a welcome resource for parties and the public at large to become aware, utilize, and gain knowledge about this process before their first court appearance.

Videos are also an important introductory tool to help increase awareness of court-connected ADR. To date, there is only one video—played in a single courthouse in the Massachusetts Trial Court System.³⁵⁶ It can only be viewed at the specific Norfolk Probate and Family Court location—and cannot be accessed from their website.³⁵⁷ In the MOPC survey, a majority of respondents thought it would be “effective” or “somewhat effective” to have an ADR video played on the court premises to help increase awareness, access and utilization. Additionally, as part of this MOPC report, a question was asked in the qualitative interviews about the use of videos. Some of the respondents said this would be useful to help increase awareness, especially if they could be watched as a learning tool—and would be especially valuable if they could be accessed prior to a litigants’ court date so they can be a more informed litigant in their process choices.

Another question asked in the MOPC survey asked, “how important is the role of judges in your court in increasing court-connected ADR awareness, access and/or utilization”? Almost all of the people surveyed said it was either “critically important” or “important” in this role. Another question asked in the survey was “how do litigants and attorneys at your court learn about ADR”? The number one choice was “information from [a] judge in personal interaction with litigants and/or attorneys”. The role of an adjudicator in published studies echo this response, and state it is perhaps the most valuable aspect in the introduction of ADR to litigants and their choice in utilizing it.³⁵⁸ As mentioned earlier, the Massachusetts Trial Court has helped with awareness to parties and attorneys by use the of bench cards that discuss, among other things, the advantages of utilizing ADR in court.³⁵⁹

In Florida and Maryland there are rigorous standards for court-connected neutrals, specifically mediators.³⁶⁰ These standards create parity of experience in court-connected ADR for litigants. There were two questions asked in the MOPC survey that centered on this theme. They were: “Based on your experience, how would you rate the quality of the court-connected ADR in your court” and “what is your attitude towards the following ADR processes”? The results for the first question were that less than half of those surveyed thought “mediation by staff mediators” or “conciliation” (there was not a distinction between “court” and “non-court” conciliation in the survey) was either “high quality” or “adequate quality”. By contrast, “mediation by non-court mediators”

³⁵⁶ Massachusetts Council of Family Mediation. (2016, July 13), *supra* note 2.

³⁵⁷ MA Trial Court (2018), *supra* note 320.

³⁵⁸ Shestowsky (2017), *supra* note 113.

³⁵⁹ MA Trial Court (2018), *supra* note 320.

³⁶⁰ Florida Dispute Resolution Center, Florida Trial Court (2018, March), *supra* note 330; MACRO (2019), *supra* note 331.

was ranked highly in “high quality” and “adequate quality”—with “high quality” receiving the largest percentage. With regard to the second question, results were similar to the first question, with the exception of “conciliation”. Less than half of those surveyed attitudes’ towards “mediation by court staff mediators” was “positive”. For “conciliation”, almost two-thirds surveyed had a “positive” attitude towards “conciliation”, and almost 80% had a “positive” attitude towards “mediation by non-court mediators”. Having rigorous, uniform standards for neutrals in the courts will allow for a parity of experience for parties across the Massachusetts Trial Court System.

As mentioned *supra*, in Florida, a portion of the state’s budget is tied to court-connected ADR funding.³⁶¹ Having a guaranteed revenue stream creates stability in the court-connected ADR system. It also helps to create transparency in the system by knowing how court-connected ADR is funded. Rhode Island also has a transparent fiscal budget which makes it easy for the public to understand how the system is being funded and that there is a guaranteed funding stream.³⁶² In Massachusetts, there is not transparency in the state’s budget, nor are there dedicated funds for court-connected ADR. In the MOPC survey one of the questions asked: “Would any of the following options increase ADR awareness, access, and utilization in your court? (Please check all that apply)”. Nearly two-thirds responded that “more state funding for court-connected ADR programs” would be beneficial for increasing access, awareness, and utilization. Consistency in funding court-connected ADR in the Massachusetts Trial Court System would allow for stability which would help to increase satisfaction with the system.

Tying court-connected ADR to the state’s budget in Florida has created uniform and equal access for all of its citizens. As mentioned prior, Florida considers access to this an “essential” service that should be equitably accessible to all of its citizens no matter where they live.³⁶³ In the MOPC survey conducted recently one of the questions asked was, “other states have employed a variety of practices in implementing court-connected ADR. Do you think any of the following practices could be effective in raising ADR awareness, access, and utilization in your court”? One of the options listed was, “greater uniformity among the courts in providing ADR services”. 72% and 20% of the respondents replied it would be “effective” and “somewhat effective” to this question respectively. As with rigorous mediator standards, having more uniformity of court-connected ADR in the Massachusetts Trial Court System would make the system more equitably accessible for all parties across the State.

Summary

Alternative Dispute Resolution is here to stay in court systems across the United States. Studies demonstrate that mediation and other forms of ADR streamline court efficiency by saving time and money.³⁶⁴ Parties are more satisfied with the process and tend to be more compliant with court orders. In criminal cases mediation lowers

³⁶¹ Florida Trial Court (2018), *supra* note 335.

³⁶² State of Rhode Island and Providence Plantations. (2018), *supra* note 345.

³⁶³ Florida Trial Court (2018), *supra* note 335.

³⁶⁴ Shestowsky (2017), *supra* note 113.

recidivism rates, and in civil cases promotes less visits back to court.³⁶⁵ Methods that help raise awareness in access, awareness, and utilization of court-connected ADR include: use of a robust website, with links to a multitude of options litigants' might need to utilize court-connected ADR; court personnel to help better inform litigants and the public at large about court-connected ADR; adjudicators informing litigants and attorneys about the benefits and availability of court-connected ADR; community outreach as a means of mainstreaming court-connected ADR; keeping financial costs to litigants low or free to incentivize its use; utilization of mandatory mediation; a consistent funding source; mainstreaming the process; and having rigorous neutral standards to ensure parity of experience to parties. Understanding that there is not a "one size fits all" approach to court-connected ADR is valuable. In some court cases litigation may be a better solution to parties and vice versa.³⁶⁶ Mainstreaming the use of mediation and other forms of ADR in the Massachusetts Trial Court System is prudent moving forward. Each of the states benchmarked, in addition to Massachusetts, utilize varying degrees of the methods mentioned above to increase access, awareness, and utilization of ADR in their respective court systems.

³⁶⁵ Eisenberg (2016), *supra* note 81.

³⁶⁶ Eisenberg (2016), *ibid*.

Section D: Findings from Interviews and Surveys of Court Personnel

The following section is a presentation of the qualitative and quantitative data collected as part of the court-connected ADR research, conducted between April and May 2019. The data is the result of fifteen qualitative research interviews with court personnel including current and former judges, court ADR coordinators, administrators and neutrals. The results of a court-connected ADR survey administered to a select group of court personnel, including those who attended the June 3rd ADR Conference organized by the Executive Office of the Trial Court is also presented. A total of 28 survey responses were received and analyzed.³⁶⁷ The majority of the survey responders self-identified themselves as ADR coordinators (64%) ($n=18$) and 21% ($n=6$) identified themselves as In-house/On staff ADR neutrals. 14% ($n=4$) identified themselves as members of the ADR Standing Committee. They were largely from Middlesex ($n=7$), Worcester ($n=5$), Suffolk ($n=4$), Hampden ($n=3$) and Barnstable ($n=2$). The rest were from Bristol ($n=1$), Norfolk ($n=1$), Plymouth ($n=1$) and Hampshire Counties ($n=1$). Key highlights from this research was presented at the ADR conference for initial feedback and discussion.³⁶⁸

Goals for utilizing ADR in the Massachusetts Trial Court

In the research interviews conducted with court personnel, it became apparent that the various Massachusetts Trial Court Departments had some specific goals for utilizing court-connected ADR.³⁶⁹ These goals largely aligned with the Uniform Rules on Dispute Resolution and findings from research literature. These goals can be very broad or quite narrow. For example, they can be goals connected to the Uniform Rules promoting ADR as a viable option in court to deliver justice, or they can be very specific at the operational-level in terms of reducing the court's workload, or at the level of party interests:

The usual (historical) goals when I worked with Susan at MODR and ran a single provider screening program, I made a speech every screening that basically said three things, I will summarize: 1) any respectable court system should be offering both the traditional trial and ADR. They should be equally available, equally visible, and equally emphasized, and that is why you are here today...we want to talk to you about an alternative to trial that the court believes strongly in making available. 2) you are helping us move our work, because if you choose mediation and it succeeds then other cases of yours' and your colleagues could be tried (more) on schedule... And 3) There are characteristics of mediation that make it appealing (and) if you would just spend some time talking to your clients (about it).

³⁶⁷ The sample size might not be large enough to make any generalizations.

³⁶⁸ That feedback is contained in the conference report and is not included in this analysis.

³⁶⁹ The resulting qualitative data presented in the study, like all other qualitative data is open to different interpretations and they are provided by research subjects from their own vantage-point(s). The researchers have used qualitative data analysis tools to identify different themes. This is based on the researchers' own technology-assisted interpretation of the data.

The Uniform Rules state the need to offer parties more choices for resolving their dispute(s).³⁷⁰ In the research interviews, court personnel noted that offering more choices for the resolution of disputes was important for increases public confidence and trust in the judiciary. The parties should have the option to use dispute resolution processes without having to seek adjudication where possible.

I think that the strongest outcome from that is a public trust and confidence in the judiciary. I think in some ways the issue of deficiencies, success measures, and the like are down the road in some ways. I think with the goal of integrating ADR basically goes back to the uniform rules and the policy statement that says: “We should offer parties more than just one way of resolving their dispute”. And I think that the idea of offering that, through education and the like, hopefully as time goes on, you’ll find there’s increase efficiencies and there’s increase use. But I think the goal is basically to create options to allow parties to choose them.

I think it’s giving parties choices for different options to resolve their disputes without having to have adjudication.

It’s about party choice, having the multi door court house. About having the idea of parties coming into court and have more than just one option.

I think that the strongest outcome from that is a public trust and confidence in the judiciary.

And I think that when we really look at public trust and confidence, to me that’s the lens we need to look at with the court created system, court connected ADR, that’s looked at highly, it has great quality and integrity.

The argument we make to judges isn’t that you’re not going to have as many good trials, but is going to be that you’re going to be able to spend more time on them and the cases that can leave and go to ADR and are also going to have a better result, public trust and confidence. Even though there are national studies, even if the parties know they’re offered mediation, even if they don’t try it they have a better view of their court system because it’s an option that they’re being offered.

The survey responses from court personnel indicate the different types of ADR options available at their various departments/divisions/local courts. The availability of ADR tends to vary by court department/division/local court. Overall, the most prevalent processes on offer is mediation by non-court staff and mediation by court staff.

³⁷⁰ Guiding Principle (b) (iv) *Informed choice of process and provider. Wherever appropriate, people should be given a choice of dispute resolution processes and providers and information upon which to base the choice.*

Table 1: Types ADR Processes Offered in MA Trial Court (n=28)

What types of ADR is offered in your court?	Responses	n=28
Mediation by court staff	25.00%	7
Mediation by non-court providers	64.29%	18
Conciliation	39.29%	11
Arbitration	3.57%	1
Dispute intervention	25.00%	7
None	7.14%	2
Other (please specify)	7.14%	2

The majority of the neutrals providing court-connected ADR services in the MA Trial Court are from approved providers of court-connected ADR. This is followed by volunteer attorneys and trained volunteers as the next most significant categories of providers.

Table 2: The Neutrals Providing Court-connected ADR Services in MA (n=28)

The majority of neutrals directly providing ADR services	Responses	n=28
Approved providers of court-connected ADR	60.71%	17
Staff mediators	17.86%	5
Court personnel	17.86%	5
Retired judges	14.29%	4
Volunteer attorneys	35.71%	10
Trained volunteers	21.43%	6
Other (please specify)	17.86%	5

The majority of the responders rated mediation by non-court mediators to be of high quality (65%).

Table 3: The Quality of the Different ADR Processes Rated (n=28)

How would you rate the quality of the court-connected ADR in your court?	High Quality	Adequate Quality	Low Quality	Don't know	N/A
Mediation by staff mediators	24.00%	4.00%	0.00%	16.00%	56.00%
Mediation by non-court mediators	65.38%	11.54%	3.85%	3.85%	15.38%
Conciliation	30.77%	7.69%	0.00%	15.38%	46.15%
Arbitration	0.00%	4.17%	0.00%	16.67%	79.17%
Dispute intervention	38.46%	7.69%	0.00%	11.54%	42.31%

The overall attitude towards ADR, particularly towards mediation, remains positive. The majority rated mediation by non-court mediators (77%), Conciliation (57%) and Dispute Intervention (55%) more favorably than mediation by court staff (40%) and arbitration (18%).

Table 4: Court Personnel Attitude Towards ADR Processes in MA (n=28)

What is your attitude towards the following ADR processes?	Positive	Neither Positive nor Negative	Negative	Unfamiliar with Process	N/A
Mediation by court staff mediators	40.74%	0.00%	7.41%	7.41%	44.44%
Mediation by non-court mediators	77.78%	7.41%	3.70%	3.70%	7.41%
Conciliation	57.14%	0.00%	0.00%	10.71%	32.14%
Arbitration	18.52%	7.41%	3.70%	11.11%	59.26%
Dispute intervention	55.56%	0.00%	0.00%	14.81%	29.63%

Another clear goal for utilizing ADR is to increase court efficiency, though this was evidently not the only goal. As previously noted, the need to provide options for resolution increases trust in the judiciary, but having the option to offer an alternative to trial can also increase court efficiency.

Well, —it's several goals I think by providing the ADR services, we're helping to increase the efficiency of the court process itself—saves time for the court as well as the parties—giving the parties an option—also to have a say on how they want things to be. They're given an opportunity to craft their own agreement. And on cases that come for a DI [dispute intervention]—our probation officers—even if there is no agreement—will provide—what we call a DI memo to the court. Which provides a summary of the party's positions, the issues. So that may save the judge sometime in the courtroom when they're having the hearing as well.

...these goals are important because it really helps in two facets. One is it's helping the court handling the cases that they deal with on a day to day basis. But it also helps the parties in providing them an option that they can have prior to seeing the judge. They can have a say—especially with the of issues that we deal with—which are family issues. Where, we're talking about deciding who has custody of the kids—what an individual's parenting time is—how much child support people are going to pay—and how to divide their properties—and things like that. It's empowering them and giving them an opportunity to have a say on what happens, rather than having a judge make an order that they may not be happy with. If they have no agreement, then of course there's recourse that they will be a judge there, so they don't lose anything by coming to the DI process—they are just gaining an opportunity to make decisions for themselves. With the approval of the court. Of course.

ADR Efficiency as a Key Goal for Court-connected ADR Utilization in Massachusetts

Most court processes cost time, and time is money. Depending on the court department and the case(s) in question, legal disputes can be complex, long and drawn-out. In such cases, a qualified neutral might be able to help, either through an ADR program approved by the court or connected/annexed to the court, or outside of the court.

According to the research survey, the most significant factors for utilizing court-connected ADR is the likelihood of early settlement (100%) (($n=28$); reducing financial costs to litigants, and speedier resolution of disputes (96%) ($n=27$); increasing party compliance and potential for clarifying issues (92%) ($n=25$); court efficiency or time and cost efficiencies to the court (88%) ($n=24$); the availability of ADR programs and neutrals (85%) ($n=23$); party relationships (69%) ($n=18$) and the fact that at least one party is pro se (62%) ($n=17$).

Table 5: Factors influencing the use of ADR ($n=28$)

Which factors are important for using ADR in a case?	Important factor	Unimportant factor	Don't know
Court efficiency (time and cost)	88.89%	3.70%	7.41%
Reducing financial costs for litigants	96.43%	3.57%	0.00%
Speedier resolution of disputes	96.43%	0.00%	3.57%
Likelihood of early settlement	100.00%	0.00%	0.00%
At least one party is pro se	62.96%	25.93%	7.41%
Increasing likelihood of party compliance with settlement	92.59%	7.41%	0.00%
Potential for clarifying issues	92.86%	7.14%	0.00%
Parties' relationship with one another	69.23%	26.92%	3.85%
Availability of ADR programs	85.19%	11.11%	3.70%
Availability of neutrals	85.19%	11.11%	3.70%

The research interviews yielded similar results. The most widely cited reasons are time and cost efficiencies:

...our decisions and our cases can be very lengthy. It's just a specialized area of the law. And its time consuming if you have to bring in people whether it be like, a traffic expert or it's different surveyors saying "this is your land" and then someone else comes out and they have to make some bounds and that could be people coming in to testify. That could take days. Whereas we could have someone take this dispute and come together with an agreement outside of the court, that would definitely save some trial time. If they wanted to bring in a bunch of witnesses to talk about, then it would be the battle of the experts, that's time consuming.

As a retired judge noted, the costs of litigation and the time to resolution can be mitigated through ADR:

I am listening to individuals telling me—especially those already involved in court how expensive (traditional litigation) it has been, how time-consuming it has been, how frustrating it is to wait and pay bills (court bills) and look at the expenses of motions and experts. Having retired from the court I see it now from a much more personal, individual basis when people have described (to me) why they finally decided to come to mediation in the middle of a pending court case.

Evidence of court efficiency, described as time and cost efficiencies, is one of the primary reasons for the utilization of ADR in the Massachusetts Trial Court. The reduction in the caseload, quicker resolution of cases, improved party outcomes like better communication, party satisfaction and even cost-benefits to parties were the most commonly cited efficiencies of court-connected ADR in Massachusetts:

I think that it reduces some of our cases and it helps to reduce the cost of parties' litigation costs because they are able to resolve their cases sooner. Another thing that even if cases don't settle, at least this is my thought, is that it helps parties at least narrow down what the issues are and maybe focus on what the issues are so that they can resolve the cases sooner.

So our courts, like many other courts are backlogged with cases some that could probably could have better results with mediation and doesn't need a judge but instead the children might be in foster care and move things along. So the increasing efficiency of our caseload management is important and serving the parties interests and needs because...we kept hearing the same feedback that the parties felt good, they felt better and it helped their lines of communication if they were stuck on something.

The benefits to the court were detailed and numerous, but court efficiencies primarily lie in ADR's ability to reduce the caseload:

You know, there are few things more valuable in the court system than bench time of a judge and if a case resolves through the conciliator—that frees that judge up—in many cases—in a place like Worcester—if this civil session—none of the civil trials go—then we are then able to take some of the criminal matters in the court and increase efficiency of our criminal session by having an extra session to hear some of those matters.

In the area of time and cost savings, court personnel noted the wait-times for trial and the possibility for self-determination as key reasons for utilizing ADR:

So we have more cases than we can handle. So a case goes to ADR and settles that means we can get to another case sooner—which is good for judges, which is good for court staff. If you are a member of the public waiting for your case to be heard, for what could be from one, two, three years for a trial and a decision. If you go to ADR and settle it the case is done earlier, you have, ownership of the agreement, in the outcome, [and] you have skin in the game for the outcome. There have been studies—many years ago showing that if people have that ownership, the agreements are more likely to stick. And there are less

modifications or less contempt—or enforcement actions, and you save yourself the money—the cost of legal fees—and time off from work—or time off for paying for childcare to get the case done earlier.

Asked whether ADR is useful in meeting any of the following goals, survey responders cited lighter court caseload (89.29%) ($n=25$), increase speed in closing cases (89.29%) ($n=25$), meeting parties' needs (89.29%) ($n=25$), earlier settlement of disputes 92.59% ($n=25$); as well as increase access to justice (78.57%), increase public trust and confidence (78.57%) and lower financial costs to parties (77.78%) as the main goals for utilizing ADR. A majority of the responders also identified lower financial costs for court 55.56% ($n=15$) as a key goal for ADR utilization in the Massachusetts Trial Court.

Table 6: Goals for Utilizing ADR in MA Trial Court ($n=28$)

Is ADR useful in meeting any of the following goals of your court?	AGREE	DISAGREE	DON'T KNOW
Lighter court caseload	89.29%	3.57%	7.14%
Increase speed in closing cases	89.29%	0.00%	10.71%
Lower financial costs for court	55.56%	11.11%	25.93%
Earlier settlement of disputes	92.59%	3.70%	3.70%
Meeting parties' needs	89.29%	3.57%	7.14%
Lower financial costs to parties	77.78%	7.41%	11.11%
Increase access to justice	78.57%	0.00%	14.29%
Increase public trust and confidence	78.57%	0.00%	21.43%

Evidence from the interviews clearly suggest that the ADR principle of self-determination and the resulting “ownership” of a decision may prevent parties from seeking litigation, and may also increase the durability of the agreement, which are factors that can help reduce the size of the court caseload.

I think that if people feel that they're creating their own solution, and you know they have a problem and they get angry at each other and they file in court and then it just continues to be a fight. As opposed to ADR where they have to sit down and talk to the other person through a mediator and all the issues get discussed. And if they don't get resolved they can just go in front of the judges and at that point but I think if people feel that they had a say in what will happen to the future of their child or to themselves, it's more likely to work. Otherwise you're just going to have a judge say: “well you're going to do this, and you're going to do this, and you can't get that”, it's not going to work. We see that with the huge case load that every judge has at every court.

ADR can also resolve cases in ways that would prevent them from coming back to litigation.

They would be able to figure out a comprehensive plan and be able to work with that or maybe if possible try to learn some strategies on how to figure out an answer rather than just saying “I'm just going to file a contempt in court” or “I'm

going to get this modified” or rather than fighting. So I think it’s possible that if there was more of a presence in the court houses of mediators or conciliators that we’d see less cases come back because there would be someone who could spend time with the parties to try to figure out to proceed with their lives as far as getting an agreement or a plan in place that will make everyone happy and less likely to come back to court.

A key finding in this regard is the perception of the parties that justice has been delivered.

I guess to get into that, you'd have to draw a distinction between a correct legal outcome and a just outcome. And sometimes a correct legal outcome can seem manifestly unjust to the parties. Because someone may have failed to comply with something fairly technical under the law—that absolutely under the law—requires a finding in favor of the other party to the action that is correct. That is legally correct. One could argue that is just—people were treated equally before the law. Morally just—there's people who come in who may bring a claim before the court that is not even a legally enforceable claim. It may have some deficiencies in it. It may be a claim that is not even a recognizable legal action. Particularly [when] we're dealing with pro se parties in small claims court. But if those people can go into mediation where no one's making legal judgments on the case—they're just trying to resolve the underlying conflicts—and those people reach an agreement that resolves the underlying conflict—even if the agreement that's reached is wrong on the law—in my opinion—isn't that still the right outcome?

Another related aspect is ADR’s ability to increase the confidence and trust in the court:

I think if people think that if they go to court they have an opportunity to sit down with someone who will be able to talk with them, figure out what the problem is, and help them come up with a solution, then that’s something that both people can live with. I think that would definitely make people feel that they had a good experience with the court because they came out with an agreement or even a partial agreement.

ADR can also result in quicker access to justice:

I have answered that in terms of the needs of the parties in terms of access to justice, you're getting quicker access to justice, generally speaking, if you can get a quicker resolution to your case. The other thing I didn't say is, in terms of the members of the bar—they're going on to their next case...but I'm sure their lives are made more efficient—the more cases they settle—then they can take care of [their] other clients.

The court personnel interviewed also focused on party outcomes like preserving relationships. As one interviewee noted:

So it does increase the efficiency of the court because it frees us up to do other things...the amount of time judges spend on the bench is such a limited and

precious resource that anytime we can resolve a case without having the judge have to spend half a day—or a full day hearing a trial—whether it's a bench trial or a jury trial—is just a tremendous help in the small claims session—but I think the greatest efficiency—the best result—in the small claims session—is just the quality of the results in terms of the parties. I think the parties are much more satisfied with a judgment that comes about through their own resolution together with the mediation—some people want to be vindicated and they want to have the court tell them they were right, that type of thing. But I think that most people are better satisfied with a result that they themselves have crafted with the help of the mediator.

As another interviewed court person noted, such measures could have time and cost-effective outcomes in the longer run:

...we are seeking to reduce the adversarial nature of the cases to the extent that we can preserve relationships, whether it's between separating parents who will continue to co parent, or whether it's in a will contest, there are going to be a relationship and people who are affected after the case reaches resolution in the court system. So we are trying to minimize the harm and it is not just that, we are seeking to increase efficiency. Although we are challenged by trying to prove a negative in that we anticipate and truly believe that the people who are resolving their cases through the ADR processes are more likely to have durable, more fully encompassing resolution so that they won't be coming back for enforcement to contempt actions, or needing to have modifications with the assistance of the court.

Sometimes, as in the family court, the preservation of party relationships is the greatest benefit of ADR utilization. As an interviewee noted:

...we also have perhaps either the greatest need or the greatest benefit from having these services coming into our court. There are high emotions, that may require confidentiality, that may most benefit from the remaining relationship's being preserved. So we have great interest in having the benefits of ADR.

ADR Utilization in Massachusetts

Evidence from this study indicate that ADR utilization in the Massachusetts Trial Court can be further improved. Currently, in many court departments, ADR utilization is low. The following responses gathered from the research interviews provide evidence of that underutilization:

So the total number of cases referred to screening—which is I think the question you were asking—there were 1469 cases referred to screening. Of those 373 were screened—and then 181 apparently were settled that referral of 469 [sic], is a very small percentage of our caseload.

Typically, over the year 30%—I couldn't even quantify because remember in the Probate and Family Court we have court-connected services and then the private market for these services. So, it's very hard to distinguish when a case has been referred for ADR.

Well, I do our report and for the five programs I think in fiscal year 19 which would have been July 1 2017 to June 30 2018 I think there was I would say probably like 60 cases that went through our ADR providers that we know of. You know that they reported that to the court office. About 60-70 a year do because I've been doing it for about a few years now and I have to look up Judge [name of judge] on that response. I don't know, it's a small percentage, very small percentage.

In the survey administered to court personnel, though the majority (39%) ($n=11$) identified that they often refer cases to ADR, a significant minority said they would refer cases occasionally (21%) ($n=6$) or considered it not applicable.

Exactly half of the ADR Coordinators ($n=9$) said they refer cases to ADR often. Twenty-seven percent of the ADR Coordinators ($n=5$) said they would refer cases to ADR occasionally ($n=5$) and a further 16% considered it not applicable ($n=3$).

Table 7: Frequency of ADR referrals

If you refer cases to ADR, how often do you refer them?	Responses	$n=28$
Often	39.29%	11
Occasionally	21.43%	6
Rarely	7.14%	2
Never	0.00%	0
N/A	32.14%	9

A further analysis of the responses by court department reveals that ADR is often used in the District Court (54%) ($n=6$) and the Probate & Family Court (50%) ($n=4$). The Juvenile Court refers ADR often as well (25% of the time or $n=1$). One hundred percent of the survey responders from the housing court ($n=2$) and the land court ($n=1$) indicated ADR referral to be not applicable. Interestingly, 27% of the responders from the District Court ($n=3$) also identified ADR referral to be not applicable.

Q2 If you refer cases to ADR, how often do you refer them?

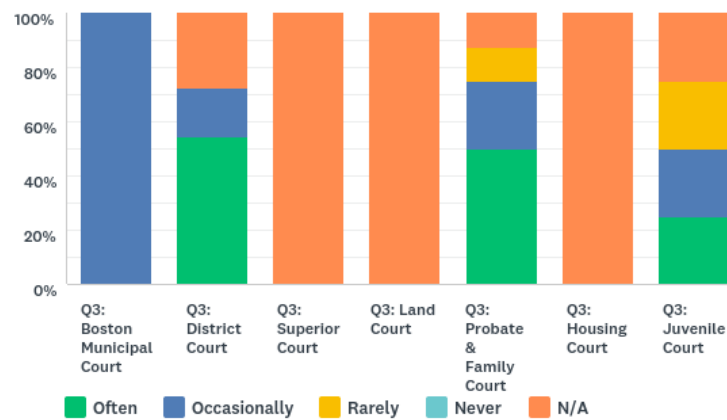


Figure 1: ADR referral frequency by court in %

Although it was difficult to quantify the underutilization in a qualitative interview, the general sense among many of the interviewed court persons was that ADR is underutilized or that ADR utilization could be higher.

The number of actual referrals in the Superior Court is surprisingly low. You would look at those numbers and be surprised—statewide that those numbers weren't higher—but those numbers are available.

I think that's part of it—and you know it's a source of some frustration. Because I think the numbers could be higher if judges advanced ADR a little bit more enthusiastically.

Oh, ours is very small. Ours is not very large. I don't know the numbers but it's very small, the number of cases that get referred. We don't do referral to either mediation or conciliation. We can't force people to do it. You know, it's not mandatory. The numbers aren't very large at all.

You know, it's a very low percentage. I had planned to look at that this morning when I came in the office but I haven't had the chance to look at the numbers. I would say only 1-5% max right now. It's a very small percentage right now.

So I think that the idea is, the one thing that I would suggest here is we have seven different departments, ADR is different in every department. So even if you're looking at it in the small claims/summary process regard, roughly about 5-7% of the cases that are filed go to ADR. I don't think that's a good clearance rate.

I think we find that in some areas the rate could be higher, but I think even if you look at small claims and summary processes, their rate of referrals and cases going there are still anywhere between 5-15%. Some of the process in the district courts are a surprisingly high rate.

As evidenced by these responses, it is clear that ADR utilization is indeed low. What is unclear is what the optimum utilization of ADR might be for each court department.

Reasons for ADR being Underutilized in Massachusetts Courts

As part of the research inquiry, court personnel were asked to describe the reasons for ADR being underutilized in the MA Trial Court. A key reason indicated was party choice. ADR is a voluntary process, except maybe for Dispute Intervention. Parties do have the right to opt out even after they become aware of ADR as a choice. The below responses from the interviews help further clarify this situation:

But I think that this is all about party choice, we're not going to change party choice. I think we need to basically understand more what that choice is in each department.

I don't recall it specifically here, but I think ADR is underutilized, but I think its underutilization rate is different from giving them the information, they understand it, and they chose not to take it. And I think that's the issue of the presumptive mandatory type of perspective because we're not going to require them to do so but I think if you look at housing courts for example, the housing specialist. It is presumed they can certainly opt out of and some of them do. But its presumed that if you basically make an option, they don't understand, and it's not presumed and it's not kind of funneled we lose people and otherwise they go forward when they could have done something differently. I think what's underutilized is a step in the process to let them know what this is, what the advantages are and having it. And I think when you look past free services, that's a disconnect because they're usually done outside of the court house. People have enough busy lives with enough schedules and if the program is not on site to provide the service there, then it's a missed opportunity.

There are also variations in ADR awareness within the different Trial Court departments that is resulting in some cases being referred to ADR and others not.

So the paradox is, why are some cases being referred and others not? I think that's awareness and it's different in each trial court department.

A lack of ADR awareness among the parties is another obstacle to ADR utilization, which may have a direct connection to party choice and ADR utilization.

I think the problem here is party choice. So more general information about what these processes are and I think we'll find this with millennials that they're used to doing some of these things and they're used to having this from coming up from having peer mediation in schools.

The limited availability of online information on ADR, particularly on the usefulness of different ADR processes could also contribute to a lack of ADR awareness, and hence to underutilization of court-connected ADR.

And I don't know if you have tried searching for the information on the website but it's not easy to find and I just wish it was a lot easier to find. I find that it's

impossible to find anything on it. And the thing is that the people don't know what ADR means, they're not going to know to look for it. You almost have to know what it is to look for it because you have to type in "ADR" and people don't know what that means and that it has to do with mediation. And I mean, I just purposefully went to the court website and the first search bar you find, it's for the whole mass.gov site and when you type mediation you get information about mediation from other agencies. I mean you find some from the court, but you have to go through it and it's sort of frustrating because it's not that easy to find, it's not that easy to use. And I was thinking, you know trying to think about a person coming to court wanting to find this information and it's just not that easy. And again because it's a general search engine for the whole state website, it's finding things from other agencies that have nothing to do with the court and the first thing that I saw was like mediation for, I don't know, I forget what agency it was, and I thought that people would get frustrated because they don't understand what that means and if it relates to court or not. So something needs to get done so that information can be easier to find on the court website and maybe even on the mass.gov site.

Parties may still struggle with information provided in court because of their mindset at the time of coming to court.

They're concerned and worried, they're just not in the right mind set as they are waiting to talk to someone. I think it really has to be a face to face thing. People don't read. For example, we having housing court here on Fridays and we have at least 5 signs that say we don't take paper work for housing court. People still stand in line to wait for papers for housing court. People don't read. They're just not in that mindset. I think it has to be a one on one kind of thing. Or having a person there or any office nearby that say ADR. I'm convinced that people don't read when other things are going on.

Although it is likely that ADR awareness may result in ADR utilization, parties can still decline to use ADR because of party choice. They may opt out of ADR because they want their day in court and/or because they seek a win-lose solution to their problem.

But I think that the clerks do a pretty good job at explaining what ADR are is in the court and like I said they're pretty successful and most people have been to ADR. I've actually been in sessions, small claim sessions where they make their announcements and I see that people often go to mediation. The only time that I see people decline to go to mediation is when they're really upset and angry and upset at the other side. But I don't think prior awareness will kind of fix that.

The court personnel interviewed felt that court personnel and judges in particular can do more to increase ADR utilization in local court. The onus is on the court to increase ADR awareness among the parties who use court services.

I think it's the court not making the referrals. So if we exclude parties that just go to whoever they want to go to—they are utilizing—but there's a lot of folks that are in court—they could use it and they're not aware of it. And judges, myself

included sometimes do not think to do the referral or to talk about it. So there's definitely room for growth.

Another key issue identified by the court personnel interviewed is the lack of capacity of ADR providers to be available on-site. ADR providers available to a local court/department may also experience high turnover. In some cases, there might be an overabundance of ADR providers in one court/department resulting in less cases referred to individual providers.

I mean just going back with my experience in surveying the programs years past, would you be willing to be onsite, even to get referrals for generating appointments, and the answer was no. When you look at providers, the providers are pretty static in the district court and in the BMC. But if you look at the turnover in approved programs and the family and probate court in the superior court, one of our two larger departments, the programs come in, they get approved, but they don't get a referral. They tend to then not seek reapplication. So I think in some ways it has to do with the programs but I think in some ways it also falls back on the court. Because if you look at why are we approving all these programs if they're not getting referrals. And if you are approving them, are you aware that, even in the district court for that matter, where they have 2 or 3 programs approved in one division. I'm not sure if that is a model that I would have created. I know this is recorded and you can be subtle with this: I'm not going to tell a department chief justice who to approve and who not to approve. Because if you look at it from the perspective where if you have a program that is only going to dividing up a court division that is problematic on the nature that they are not getting cases.

Even when ADR providers have the capacity to be on-site, some courts might not have the space for them to maintain that presence and/or provide on-site services.

But if you can find space—space is at a premium in courthouses. This Monday I have a trial—and I'm not sitting in my usual courtroom. We have too many judges. I have to go to another court and that happens to us two days a week. So space is at a premium.

The willingness of ADR providers to increase ADR services is tantamount to their capacity to recruit and/or retaining a steady ADR workforce, like community mediators for example.

...it is underutilized in that many, many more people could benefit from ADR than currently benefit from ADR—but the no part is—I know our community mediation program that is serving our court and many ADR needs in the community—is really feeling at capacity. So I do not know the answer. I think you have to expand—if you expand ADR—you would have to expand the number of available mediators—well trained mediators.

Well partly, I can imagine a particular provider's saying we would love to be there, but we only have enough money to pay mediators twice a month—or a

court saying, "we'd love to have you come in, but we don't have a place for you to mediate".

A serious challenge is posed by declining volunteerism, which affects the ability of ADR providers like community mediation centers to fill their rosters with skilled mediators. This is causing fresh concerns about whether the volunteer mediation model is sustainable any more.

But, I don't think that a volunteer model is sustainable. I do not think you are going to get mediators who can give the kind of time and effort to both the training and to performing services in this economy—who are going to be able to do it for free. So, I really see that as a huge barrier for the court to figure out how to overcome.

The cultural piece I really think is huge—on so many levels—to have to face losing the volunteer part of that is huge.

When providers are unable to be on-site, courts can no longer refer cases to ADR. In such circumstances, judge education, awareness and willingness to utilize ADR has no effect.

You are a judge in a busy motion session—just think about Middlesex for second. You are just one right after the other, right after the other, you are not really thinking about outside resources or this or that. However, if you know that there are two mediators that are there for four hours, that you have been told you can send down, you know, two or three cases, you're going to do that. But if you don't have that, you're not necessarily going to start a process for screening and this and that. When you've got, you know, two people that clearly just need to figure out whether it's okay for Johnny to miss the Friday before April vacation to go to Disney world and save the father \$500 in airfare. Sometimes that's the issue.

...the more a judge has to keep in mind—are they here today or not, are they here within these hours, whatever. If we only can approach it piece meal that makes it less likely that people are going to keep it front and center for using the services that could be available. If we could have the people by virtue of their being paid and dedicated, and being on site, they are more likely to be used and it'll become circular as far as reinforcing then in the usage they will become successful.

Another obstacle for ADR utilization is judges' preference for certain ADR processes over others, like conciliation over mediation. Judges understand conciliation better, and conciliation is delivered by attorneys. Judges might also see volunteer mediation as indicating low quality.

Judges are tending to utilize conciliation more because they have confidence in lawyers, and they are the only ones who can do conciliation. The best of the conciliators can be very helpful, but if they take on a—a you know head-banging—we have 15 minutes to resolve this kind of approach, it will be

frustrating to the people even if they get an agreement. And it will give ADR a bad name, so I think people have to be careful of that. And the other part of the answer is the Uniform Rules were structured at a time when people were willing to volunteer for community mediation and other ADR services. The bar—at least out west—the bar has been very, very generous in the time that they have been giving to conciliation.

But it is so interesting—because the volunteer model is so embedded in the judicial system, that judges will make fun of ADR by calling it “a cottage industry”.

Whenever ADR is available, and judges have confidence in utilizing ADR, the chances of ADR utilization can be high. This is because judges have a great deal of discretion in determining which cases are referred to ADR and which are not.

Then, the other thing to say is that in the local courts, the local judges also have considerable power over what goes on in their own local court. Those things often differ.

Judges can educate parties about ADR, but can not require or force parties into it. Even when cases are referred to ADR, there is no guarantee that they will proceed to other steps in the ADR process. This is the case with many voluntary ADR processes, as indicated above, where the parties can opt-in or opt-out of ADR at any stage of the process.

The judge can direct, but again, we can't refer, we can't require it—I think in the Probate Court they do require it—and in other context ADR is—quote unquote required. So we can't require it. So I think some judges are very concerned and rightfully so, they don't want to overstep—they want to be respectful of that rule—that we can educate—that we can even encourage—but we cannot require it. So, there is that.

If a judge sees that this is just a dispute that could be resolved in mediation. Things that are like a heat of the moment kind of situation and say “that's it, I'm going to file a complaint”. I think that they pretty much know things that are right for it and they'll talk about it and say you can resolve, you should think about x, y, and z. You know if think if it's a big project or a big company then they're not going to think about it. But if it's less than \$10,000 to solve this as opposed to going in and out of court. I think they would say, I think they would know whether or not it's right. Is it the family that almost there? And he feels like a conversation outside of the court with someone that's neutral would actually settle it then I think that they would say “I think you should go to screening” and kind of push it. You know they can send someone to a mandatory screening because screenings are free. I don't see that as much. Usually parties will agree with the judge during the screening but then they might not follow through at all. They don't have to enter the process.

Attorneys may also voluntarily refer cases to ADR. Although Rule 5 of the Uniform Rules is clear about the role of lawyers in discussing ADR as an option with their clients, there is no provision for enforcing compliance. The urge for lawyers to take cases to trial versus the urge to settle cases through ADR are competing interests.

There is a second factor which I think had more currency in the past than it does now. But there is this phenomenon in the courts of the shrinking jury trial and the shrinking number of jury trials—that has a lot of consequences. There's less decisional law, there are less lawyers actually engaged in the trade of trying cases. There are fewer of them—I think that there is some residual feeling that some—and I don't want to overemphasize this because I don't think it's prevalent—but there is some feeling that ADR is to some extent competition for the court system that we don't want to shrink the number of jury trials, such that—with all of the ramifications that come from that.

Rule 5 of the Uniform Rules was an attempt to deal with that. It was attempt to say every lawyer had to talk about ADR with their client early in their professional relationship—and they had to file a certificate with the court to say that they have done that—practically no place observes that rule—that I am aware of—or if they do it is very perfunctory.

There is also an enormous cultural element involved in helping the Bar learn about the value of ADR—and how to think about ADR, and how to talk about ADR with their clients—and I don't think we have done anywhere near enough good job of that.

Attorneys can act as gatekeepers to ADR utilization, and there are serious financial interests involved. The court personnel interviewed indicated the need to provide incentives and education to lawyers to increase ADR utilization.

I think in some ways the attorneys are gate keepers. But I think it's also we probably need to do a better job with informing attorneys and how it would benefit them. I think the one thing is, when you look at any profit motive of any industry, attorneys get paid for trials, attorneys get paid for time spent on cases. We also need to let them know that this is a process. I think the example of the state is, if it becomes a process of the court, mandated or presumed, the attorney will go along for the ride because they get billed through it. I think when it's a voluntary situation and it's left to the parties to choose it, there's a question of self-motivation for the parties and the attorneys and I think that goes back to awareness. We're not going to get involved with the parties and their attorneys with what they decide, how they want to litigate their cases. But I think if we can show that these options are available and that they understand the options and as the case proceeds, they are reminded of those. Because as the expenses come up and the time becomes longer, then maybe additional incentives to try to solve the case, well that might not be the first blush when someone comes into court and their mad as hell because something happened to them, like they lost money or were injured or whatever and then we say, "do you want to try something except for going for your piece of flesh?"

The court personnel interviewed also reported a growing relationship between lawyers and ADR providers. According to the interviewees, lawyers are increasingly realizing the opportunities afforded by ADR for mutual gains.

Lawyers who have learned how to use ADR effectively have just the opposite perspective. They value the professionalism of the really good mediators, and they see that their clients are so pleased with the outcomes, that the lawyers gain business from that because of the way they steer their clients towards resolution. I think that is what has been the experience in other states too among the bar, but I cannot explain why it has not happened here.

However, lawyers might refrain from referring cases to ADR whenever the ADR provider does not have the requisite subject matter expertise required in some cases.

I hear that the problem that some attorneys have with utilizing some of the services is that the mediators are not informed on the subject matter. So now you are going basically with the parties trying to come to an arrangement. However, what usually they are looking for (parties) is somebody because they are aware of the subject matter to sort of guide—to make sure that the agreement that the parties are coming up with is something 1: the court is going to accept; and 2: something that is feasible. I personally believe that when you do not know your subject matter, and arrangements are being made—those in agreements—and the parties are guiding what is happening—there maybe disadvantages to one or both sides because they are looking for guidance and none is being given. So, I believe more awareness of your subject (for mediators) would enhance your mediation process.

The very nature of the court system, and the culture of litigation/adjudication may also affect ADR utilization. From a historic perspective, this is a reflection of how society has approach conflict resolution. The resolution of conflicts/disputes is often seen as a win-lose or zero-sum game. Those trained in this worldview may not see much value in ADR as a win-win approach to conflict/dispute resolution.

I think there is a huge chicken and egg problem in all this and I—it is such a long and philosophical discussion—but, people who have set up the court system from the beginning of our country have been devoted to the notion of the adversarial trial as the mark of how to achieve fairness. You put two people in the middle with their points of view like gladiators in the system and you have fight it out to the death with the judge being the one to decide who wins. And, generations of lawyers have been trained to that model. And there is so much that is positive in that model for certain kinds of cases, and there is much that is negative in that model for many other kinds of cases, but you have people trained into it who don't know another way. That is how they think conflict should be solved—that and they think about it with almost religious fervor because it is so embedded in the way we think about justice in our country. So, it is very tough to put a lot of people who have been trained in that system into a working system and then expect them to open their minds to an all-together new model. That is an enormous challenge for the system. I cannot sit here and

say here is how you fix that...one, two, three...because it is so huge. But I do think that it is an element of the reality that ADR faces in the justice system. Somehow, some very open and forward looking leaders of our future need to recognize and work with.

According to the court personnel interviewed, the dispersed nature of the Trial Court system is another obstacle to centralizing ADR administration in Massachusetts. Therefore, institutionalizing ADR is at the discretion of these dispersed court departments/local courts. This makes the process of ADR utilization look different from division to division, department to department and/or court-to-court.

The more sort of sociological part I think has to do with how difficult it was for the 7 different departments in the TC to come to any meeting of the minds on what ADR was going to for them. Each department had its own view on what it needed, and they were pretty different, and a lot of them didn't really see the need or the value of ADR at all. In a lot of ways (laughs) you can still see that reflected in our system, where ADR has become integral in courts around the country and around the world, and here we are still fighting the battle of should we have it and how. And, the other thing that needs to be said about the sociological part of this is that, I guess 2 other things; 1: is our system, our court system, just like our ADR system, is not centrally guided like it is in many other states where they have a unified court system. Here—you know we have the 7 different chiefs of the 7 different departments and each of them has huge power as to what goes on in their department and what does not. There is certainly overall administration going on as you well know, but the power of the departments in MA is very different from what happens in a lot of other states. So each department's ADR scheme looks very different from the other department's schemes—let alone from all the different states. So, it is a bit of mishmash.

Successful ADR Practices and Models in Massachusetts

The research also uncovered two successful ADR models and effective ADR practices in Massachusetts that require attention, particularly as the Trial Court moves ahead with further institutionalizing court-connected ADR. Among the most impressive models identified is the Salem Probate & Family Court model, which is a unique collaboration between the Salem Probate & Family Court, the Department of Revenue (DOR), community mediation centers and MOPC. Through this collaboration, the Probate & Family Court has been able to ensure the provision of on-site mediation services and the oversight of mediators through the community mediation centers and pilot project implementation partner MOPC.

So, the pilot that we have in Salem has been very, very successful. And when I looked at what our statistics as an entire department were for a full fiscal year, I realized that there is a little bit of magic to it. And I will suggest to you that one of the things that ADR, if it's going to have a real strong presence in our court, they need to be on site and they need to be compensated for their time. In each of the three—or two of the three facets of ADR probation, they are paid,

conciliation—they volunteer through the bar associations. But I will tell you that in a way they receive benefits for doing it—and that would be having a judge recall their generosity and finding them appropriate to be appointed a discovery master on a case perhaps where the parties do have finances. So there's a little bit of a quid pro quo so it makes it beneficial for them to do the conciliation program. However, the third component, the mediation—does not have that structure in our court and by working with MOPC—in providing funding, we were able to get onsite mediation up and running in about four months. And I think the reason why it was successful, especially in Salem, is because it has structure and the people that were doing it—the mediators have responsibilities and MOPC oversees it—is overseeing that structure and were compensated to do that. So that's what I would add about why I think it's kind of hard to get real ADR in our courts unless we have—and continue to have a presence mediation—a presence. And by needing to have a presence I think requires some compensation. Or else, if they're volunteers, and they come when they can, and there's no organization to it.

In the Salem model, the court and DOR collaboratively developed an attractive brochure to be handed to litigants on the ADR block day.

In the pilot that is a very plain language brochure with a picture of children on the front that said the future is bright. And the word free is we're very much kind of there. We worked with the Department of revenue so that those brochures were handed to people when they checked in for block day. And so that's one way in which people are aware during that particular session because I'm involved with that one. I'm going to defer to [name] on how the divisions generally are made aware for the litigants.

The Salem Probate & Family Court also utilized its relationships with other external organizations like the Mass Council on Family Mediation to help promote ADR, and have succeeded in increasing awareness of ADR.

In our department we have the benefit of a statewide organization that's not part of the court system, but shares some of our goals that that organization being the Massachusetts Council on Family Mediation. So they are also working to promote the awareness of the benefits of mediation and ADR generally. We, to the extent that we have any cross messaging and can leverage off of their membership and off of their awareness in the public, we do that.

Another key effective practice in this new model is the referral process. Cases suitable for mediation are pre-sorted and identified by either DOR, judges or court personnel, and the litigants are encouraged to meet the on-site mediators.

I think we have to use our partners; we have to use our stakeholders. I think we really have to collaborate. The Department of Revenue considers us in collaboration on this pilot and the commissioner of the Department of Revenue was very pleased with the DOR involvement in the referral process that they've engaged in. So, I mean there are a lot of things that were [inaudible] good—a lot

of things to learn, but that's the route I think we need to go—is [sic and] we need to see results.

Between divisions, if we have the onsite pilot for example, the one that [name] made reference to, we built into the system to have either DOR or court judges and court personnel try to pre identify a case and suggest to the litigants that they go to the onsite mediator with services. In other instances, we've had Probation be able to call it to the attention of the litigants in those divisions where Probation has been amenable to being a collaborative approach. In other cases—they're not necessarily getting referred.

Another effective practice is the compensation provided to the ADR provider to ensure that on-site mediation is available in the Salem Probate & Family Court.

Yes, and again, we want this to be successful and it is a big state, and we have a lot of difficult cases, so it's not like the greatest thing to do unpaid—to come into our court and really hear a lot of negative whatever. So I firmly believe the structure and the compensation—if it expands—it becomes more known by its presence—which it already is. That is what is going to make it successful. Because one ADR provider that is a member of our staff at a courthouse, I don't think is the way to go at least at this point in time. I don't think that that's the way to go.

The court leverages economies of scale by tapping into the local community mediation centers through their pilot project, which MOPC administers. This helps the court avoid project management costs and hiring court personnel to provide ADR services.

When I was given instructions relative to what the ADR funds could be used for—it specifically stated, it can't be used to hire anyone, like an employee who is going to be the ADR guru. So there was a limitation. So that's kind of how everything started to evolve with your organization. Because I could pay you to structure it to engage the mediators. The mediators were very available because—obviously it was nice for them to provide the service and be compensated because they are professionals and they should have some compensation. I mean, not everybody can be a volunteer, especially when it's difficult for there to be any quid pro quo with the mediators in that process.

These economies of scale and partnerships will enable the court to expand the services through MOPC and community mediation centers to other court divisions. This approach enables both in-court and out-of-court ADR services for litigants.

I would hesitate to hire anybody as a Trial Court employee at this point. What I would like to do is to expand within the structure that I've established with MOPC to try some other types of cases in other divisions and I believe that in order for the structure and for it to be successful, I actually think initially that we need MOPC to really allow for real mediation at the courthouse and successful mediation outside of the courthouse. So I don't think hiring an ADR person in three divisions, I just don't think that that's going to make that much of a

difference. But I think something like this and expanding how it can be used would really benefit the system.

Another key ingredient in this model is the leadership of the Salem Probate & Family Court, as well as the funding it received from the Trial Court.

It was probably the pilot that was put together the quickest with outside stakeholders in probably the court history. Because, we don't generally move fast over here, but you know, time was money and I wanted to make sure that we showed that we use funds and we had success with the funds we used and why it is a good initiative moving forward.

The success of this model can be measured in terms of its outcome and the interest in replicating it elsewhere in Massachusetts.

I wanted to read—I'm try trying to find an email that I want to read to you. That was sent about the Tuesday block day—or the Thursday last Thursday, uh, last Tuesday block day. It was the last block day in Salem, the last time the mediators were there. And I just want to kind of give you an example of the response that we get. Now. Remember there's two mediators and this is the email for the last block day in Salem. Directed to [name] says, we did have a good day, we had seven cases referred to us, 4 cases mediated and parties reached agreement in all four cases. Of the other three referrals, one declined mediation, another one had a party not show up, the third referral, had both parties present, but we needed a Spanish interpreter and he was busy. So the case did not go to mediation. And then they were talking about a couple of people have been instrumental in getting the program running smoothly in Salem. So on average in Salem on block day, we're resolving 4 cases every block day. And that's a really good amount when you think about the fact that we only did it an entire year and all departments at 181. So that's why I feel that there is a really good likelihood to have success.

I was actually meeting with another court department with my chair hat on and they were talking about different things. They were thinking of ADR and I told him about the mandatory pilot, and I said, I still have the first and only mandatory pilot. And then I said, but you know, imitation is the greatest form of flattery. So go ahead and plagiarize and do the same thing I'm doing and I'll be happy to help you get it going.

A second ADR utilization model, also from the Probate & Family Court is used in the Probate & Family Court in Hampshire County. The model works by integrating ADR into the list of services a couple/family receives during divorce.

Judge Fidnick decided to become a specialty court for a very different way of doing divorce, and we have just begun the third year of this and we are just expanding to other types of cases as well—guardianships and other family related things. And here is how it works: you are assigned to a judge, but the judge never hears a trial, never does anything that formal. But a family comes in

and they are assigned to a team. The team is comprised of one family consultant—a mental health professional with experience with families and children—and the developmental needs of children, a mediator, and an attorney for the child. This team, helps the couple move through the process, focusing on the needs of each family member, and the needs of the children—along with a lot of coaching about how to learn how to solve problems in a “mediative” sort of way.

In this model, the judge, a mediator and various other service providers sits down with the family and help the latter work things out.

The judge comes down off the bench—she sits with family around a table, they have a discussion about how the process is going, the judge guides them in certain ways if they need it. (For ex:) why don’t you take a few more months on the efforts you are making on your alcoholism; let’s take a few more months on figure out what this very seriously ill child will need; etc. And, the family really just feels “held” throughout the process, in this very supportive in this cross-professional group of which mediation is one element. These cases are tending to solve themselves in about 6 months as opposed to the year and a half that divorce usually takes. And people have been extremely satisfied with the process.

The focus is on providing the divorcing parties and their family a holistic solution to the problems they may be facing. ADR is built into the process to help the couple/family manage conflict, improve communication and come to agreement on issues.

This amazing program has ADR written into it. Everybody is assigned a mediator, and the mediator and the family consultant work together to figure out whose expertise at the moment is going to serve this family best? Do they need more information about development and what these particular children might need in the way of a parenting schedule? Or do they really need to hammer out some agreements on property—or other money issues. Then the team members just go to work as needed—with the couple. And the couple’s voices are the primary voices in the process—they are always the people the judge listens to first before the lawyers. There is just so much more to tell you about this. It is an extremely innovative and exciting program for the courts. It is quite wonderful that ADR is—by policy—written into this model.

The effectiveness of this model was apparent in the interview. By bringing in ADR alongside other helpful processes, the Hampshire model can help parties preserve their relationships despite divorce.

I will just give you two quick examples so you can see the effect on peoples thinking. After one of these cases was over, the judicial case manager in our court saw the couple sitting outside the courtroom on block day—which is the day you come in for the Department of Revenue to work on child support issues—you know like if someone is not paying their child support. And she thought to herself, what are they doing here? We just finished up a couple

months ago and everything was good. So, she went out and talked with them. And it turned out that the father had instituted this modification because his salary had gone up and he thought he ought to be paying additional child support. None of us had ever heard anything like that ever. Another example is this young couple who were just furious with each other—could not sit in a room together—couldn't talk together—couldn't raise their child together—and by the end of this thing they were able to—chat on the phone at night—you know general things. They took part in a panel discussion that we had to introduce this program to the mental health community in Hampshire County. They were—you know teasing each other—nudging each other—and in the course of this panel, the woman said “you know what this program gave me more than anything else? It gave me my friendship back”. Everybody just got silent, —there was no way this couple was going to get back together, but they had learned how to retrieve that part of the relationship that had once really mattered to them—and that created this whole new atmosphere for their child going forward.

Other effective practices and models for utilizing court-connected ADR have emerged in individual courts/court divisions. This includes instances where some Judges use ADR on harassment prevention cases.

I think that with the backlogs of the court and some of the cases that do come forward, for instance I'll use the harassment prevention cases as an example, they're very time consuming for our judges and sometimes they could be perfectly right for mediation. Maybe there's just a misunderstanding or maybe the two parents of the children, the issue is really more with them and that it might not rise to the level of meeting a judge. We're starting to see now, especially we've reprogrammed between Middlesex and Essex county have received funding for harassment prevention cases and now more judges are saying “ I would really like that too, that would be a huge help with my case load”. But we need more trained mediators, programs, but really more funding.

Another existing model is permanency mediation.

I think what's going help us the most right now is the juvenile court received money on a special line item from the legislators for permanency mediation and we're starting that in western Massachusetts. Permanency mediation is within our [inaudible] protection cases and in Western Mass we're starting in Springfield, which is a very busy court, there's quite a bit of backlog in those cases and the judges are all very much on board and we are having a kind of a roll out of this program on May 10th. I think that word of mouth is really going to help. I think this program is really going to help me, the office and the court. When we get in, we implement the permanency mediation per ramp in Springfield. If we can get the results, our chief justice has monthly [inaudible] meeting and this has been an issue that's been discussed and will continue to be as well as in our yearly conferences. So I think we're hoping that this Springfield roll out will be a success and we're hoping that other counties are going to be

saying “oh, I want this too, let’s go statewide”. Then if we can show a success rate that we can use to argue with for more money in the future to go statewide.

A lot more innovation is happening at the level of the judge in promoting court-connected ADR, and in integrating ADR into the local court systems. A key effective practice is the effort judges make to build relationships with the local ADR provider(s).

I think the most important thing from my point of view is that our court has a good relationship with the local ADR program. And I think that the local courts and the ADR programs should have a relationship. As I sat [inaudible] in family services mediation for years and I said, hey, would you come when we do our trainings, would you come on the last night and do a little bit of a round table discussion about cases in court—or talk a little bit about what you want to see in agreements and you know, what you don't want to see in agreements or uh, just explain a little bit about court procedure to people. I've always been happy to do it. I think most people would—a partnership agreement between the court and the ADR program. So I think it's something that the courts and the ADR programs themselves have to be encouraged to get to know each other a little bit and to work together.

And we have our local mediation program, which is Family Services of Central Mass Mediation Services who provide mediation services for us, and I've worked very closely with them both in the session and outside of the session as well—taking part in trainings at their facility after hours—and different continuing Ed type events.

I do a court orientation where I bring them up to a courtroom and kind of show them around and answer any questions, that type of thing. But I worked very closely with them and try to encourage people to utilize the service to get them over to him [mediators]. And then, obviously any agreement that comes out of mediation is presented to me, whether it's an agreement for judgment or whether it's an agreement to just put the case over to another day—so that some type of out of court settlement can be worked out. And I just try to make sure that people understand what they're agreeing to before—either a judgment or a continuance.

The most effective practice, however is the promotion of ADR by judges where they introduce ADR to the parties and attorneys when they determine that a case is eligible for ADR. This also results in an opportunity for the ADR provider to explain the process and for the parties to decide whether they want ADR or not.

When I call the session, I inform people about mediation as well—and in Worcester—I actually just started [this]—I used to just inform people. I'd go through and explain mediation—I'd take a few minutes to explain it. And then—as I was calling the cases—I'd say, "would you like to consider mediation?" What we've just started doing—after I was speaking with one of the mediators here—is all of the cases that are sort of mediation eligible—I've been asking them just to screen with the mediator—and the mediator will then take them in—where

they're not in the courtroom and they do not feel like they have to posture in front of anyone. Then the mediator will take a few minutes to explain mediation to them—to explain it's voluntary—the advantages of it. And then the mediator could sort of see whether or not they're interested in it. We are trying that because we're trying to see if we can encourage more people to take advantage of it.

I inform people about mediation. I say a few words about it. And then I have any appropriate cases screened with the mediators. So, by the time someone's talking to a mediator about whether or not they think their case is appropriate for mediation—hopefully they've read something they got in the mail—and they've heard me say a little bit about it—so hopefully—they [are] listening with an open mind—when they are actually face to face with somebody hearing about it.

I think sometimes people don't distinguish their own attempts to settle the case themselves and they don't understand the distinction between that and mediation—that's why I've changed my approach. Rather than just have me explain the process and then say to somebody, "would you be interested in mediation?" I ask all the parties—who I think have a case that would be appropriate for mediation—I ask them just to meet with the mediator and just screen with them—so not compelling mediation—but just asking them to take some time to speak with the mediator. And I think it can help increase the number of people that will take advantage of it. As I said, we just started doing it. But I think this is going to be something that will hopefully improve our participation rates in mediation.

When explaining ADR to the parties, it is also important for judges to distinguish ADR from adjudication. This too is an effective practice in some of our courts.

If you go to mediation, the outcome of the case is decided by the parties—so I make sure they understand [and] I do emphasize the distinction between a mediation where the parties decide the case. Versus a trial where the presiding parties only present their side of the case—and then somebody else decides how the case is going to turn out. So I do try to emphasize that [mediation] keeps the outcome of the case in the hands of the parties rather than have some third person decide how your case is going to turn out. So I do emphasize that with folks.

Key Considerations for Increasing ADR Utilization in Massachusetts

There were several key considerations for increasing ADR utilization in Massachusetts. The most important consideration is the role played by judges. Survey responders agreed that the judge's role in educating litigants and attorneys and referring cases to ADR is indispensable. The information that judges provide in personal interactions with litigants and/or their attorneys was by far the most successful practice for raising ADR awareness. This was followed by the role of the administrative staff and the ADR coordinator.

Table 8: How litigants and attorneys learn about ADR (n=28)

How do litigants and attorneys at your court learn about ADR?	Responses	n=28
From written materials about ADR such as brochures available at court	42.86%	12
Information from judge in personal interaction with litigants and/or attorneys	75.00%	21
Information provided by ADR coordinator	53.57%	15
Information from administrative staff in personal interaction with litigants and/or attorneys	57.14%	16
Presentation to litigants by ADR providers	25.00%	7
Video(s) about ADR	0.00%	0
ADR information and materials provided on the court's website	25.00%	7
Other (please specify)	17.86%	5

The role of the judge in referring cases to ADR, and in promoting ADR in court, particularly in the presence of the parties and attorneys cannot be underestimated. Rather than passive approaches like making information available to parties, judges can take the lead in promoting ADR more actively.

We do have a sheet of providers we do have a pamphlet available in the clerk's office. But having the judges speak directly to the parties and the attorneys that are involved in the case right there is probably the best way to do it because they're a captured audience, they're paying for their attorney to be in court or they're there themselves and they've paid for parking or they're waiting in there. So they're here to hear firsthand from the judge. And I think that that's the best way for us to tell them. And they can follow up with the session clerk and the clerk is there to make the referral or they can contact directly themselves.

Half the survey responders (50%) agreed that the role of the judge is critically important to increasing awareness, access and utilization of court-connected ADR (n=14). A significant minority (42%) said that the judge's role was important (n=12).

Table 9: The Importance of the Judge in Promoting ADR (n=28)

How important is the role of judges in your court in increasing court-connected ADR awareness, access and/or utilization?	
Critically Important	50.00%
Important	42.86%
Somewhat Important	3.57%
Unimportant	0.00%
Don't know	3.57%

These findings also aligned with the findings from the research interviews. The court personnel interviewed noted that having person-to-person interaction with court

personnel is critical to raising ADR awareness and utilization, more so than passive communication methods like ADR pamphlets or the internet.

I think it would be useful if we had more information in the hands of the courtroom clerks about the program, and if the regional administrative judges on the civil side emphasized the availability of mediation to their judges. I have never been persuaded that a pamphlet or a handout that just lies around the courtroom is helpful—because no one would bother to pick it up (laughs). Somebody has to start the conversation, someone has to say (like a lawyer) do you have a mediation program, then you could give the litigant a handout. Or the judge has to say “you folks ought to consider mediation.” But it is fine if you all, we have had pamphlets and handouts in the past. But it seems to me is to get people to ask for, or judges to suggest it.

I think some of them don’t learn about it at all. I think that the idea is how did they learn about it? Sometimes, usually depending on what case it is, it may be the day of trial, as in small claims at the summary process. We do have information on the web. It’s not accessed that often so I don’t find people getting the information there. I think it also depends on what court they’re in and how is ADR explained to them. Either at the counter or the day of trial like in small claims, usually the clerk would then call the list and then suggest that there is an ADR program here and to try ADR.

A majority of the survey responders agreed that the role played by the ADR coordinators, clerk magistrates and court staff in referring cases to ADR was also important. The majority of the responders also acknowledged the role played by the providers and the importance of party choice.

Table 10: Level of importance in ADR referrals

Please indicate the level of importance exercised by the following on your court's ADR referral process:	Not Important	Somewhat Important	Neither Important nor Unimportant	Important	Indispensable
Judge	0.00%	15.38%	0.00%	42.31%	42.31%
Magistrate/clerk magistrate	3.57%	3.57%	3.57%	53.57%	35.71%
Court staff	10.71%	3.57%	14.29%	53.57%	17.86%
Court ADR coordinator	7.69%	0.00%	7.69%	61.54%	23.08%
Parties’ choice	3.57%	10.71%	17.86%	50.00%	17.86%
ADR providers	0.00%	4.00%	16.00%	56.00%	24.00%

Survey responders also indicated that the role of the ADR coordinator in their court was indispensable or important. It should also be noted that 64% ($n=18$) of the survey responders self-identified as ADR coordinators.

Table 11: Importance of the ADR coordinator

How important is the role of the ADR Coordinator in your court?	Responses	n=28
Not Important	3.57%	1
Somewhat Important	10.71%	3
Neither Important nor Unimportant	17.86%	5
Important	39.29%	11
Indispensable	28.57%	8

Ideas for Increasing Court-connected ADR Utilization

The following is a set of ideas generated during the interviews and surveys for increasing court-connected ADR in Massachusetts. A key finding in this regard is to formalize ADR services in court by creating more on-site programs and expanding the definition of court ADR to include services by individual ADR providers.

I think my point, presence in court, organized structure, mediators paid, and again education about—that it's not all—it doesn't have to be everything—but can be part a part of the case. So just the education of some of the different services. And also I feel that the requirement or the impression that rule 118 requires the court approved mediator to be a program, I think changing that would provide for more of a pool of trained and qualified mediators that would be able to assist in this objective.

Another idea for increasing ADR utilization is to bring back ADR screenings.

I would personally go back to what is in the SJC Rules, the ADR screening event. If you want to try something centralized, you get a standing or order, or something from the CJ saying every civil session must run an ADR screening event pursuant to...I forget what the number is, and it must be run 3-6 months prior to the formal pretrial conference. That is the old (way), we tried it, it died, mandatory ADR screening with face to face confirmation information, registration, signups, whatever you want.

Survey results indicate that litigant understanding of ADR is low when they first arrive for a court hearing or conference and that attending an ADR screening can help litigants understand the ADR process. However, the majority agree that litigants' awareness of ADR increases, particularly when they begin their first ADR session.

Table 12: Litigant Understanding of ADR (n=28)

Litigants understand the ADR processes:	DISAGREE	NEITHER AGREE NOR DISAGREE	STRONGLY AGREE	AGREE
When they first arrive for a court hearing or court conference:	50.00%	25.00%	0.00%	14.29%
When they attend an ADR screening:	7.14%	25.00%	7.14%	39.29%

When they begin their first ADR session:	0.00%	14.29%	14.29%	57.14%
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A key finding for increasing ADR utilization is to educate and train court personnel. Additionally, having court personnel experience ADR firsthand can help them promote ADR processes in court.

It could be helpful and court staff that are familiar with it know it can certainly expand the outreach with court staff—even if you're not directly involved in ADR, that if some litigants standing at the counter filing something, they could be handed an ADR brochure—or you could say, "would you like to speak to our ADR coordinator?"

One thing I would be—I would train the staff itself—the registry staff—ours' is called registry—but different courts call it different things. The administrative staff in the local courts—the people who talk to the litigants across the counter when they come to file—I would train those people in elements of ADR (32:58). We did that in our local court—where we did a mock mediation for people. And the result was unbelievable, because—about three things happened. 1: people said "oh my God, we never knew what went on behind those closed doors! This is amazing just to know this." One person said "I am going to use this for my family, know that I know what this is about. 2: And the other piece that happened was that the staff felt enormously trusted with important knowledge, and it elevated a sense of themselves and part of the learning was to help them was to talk across the counter to litigants who were in trouble—and suggest even at that early moment—that they might want to consider ADR. So, just little things like that that bring people in way where ADR doesn't have to feel foreign—it can feel normal from the very start.

The overwhelming majority of survey responders indicated that ADR awareness among attorneys, litigants, and the public would be very useful in increasing ADR utilization (81%) ($n=21$). Large majorities of the survey responders also agreed that awareness of court-connected ADR among judges and court personnel and more information about ADR programs (80%) ($n=20$) would be very useful. Survey responders also cited that the commitment of the judicial system to using ADR (74%) ($n=20$); earlier notification about availability of ADR to litigants/attorneys (70%) ($n=19$); ADR training for judges and court personnel (53%) ($n=14$) and having a larger pool of qualified neutrals to refer cases to (51%) ($n=14$) would be very useful and a half (50%) ($n=13$) indicated that discussions with peers about the use of ADR would be somewhat useful.

Table 13: What would be most useful in increasing ADR utilization? ($n=28$)

What would be most useful to increase the use of ADR in your court?	Very Useful	Somewhat Useful	Not Useful
More information about ADR programs	80.00%	16.00%	4.00%
ADR training for judges and court personnel	53.85%	30.77%	15.38%
Discussions with peers about the use of ADR	42.31%	50.00%	3.85%
Commitment of the judicial system to using ADR	74.07%	25.93%	0.00%

Awareness of court-connected ADR among attorneys, litigants, and the public	82.14%	10.71%	7.14%
Awareness of court-connected ADR among judges and court personnel	80.77%	19.23%	0.00%
Larger pool of qualified neutrals	51.85%	29.63%	3.70%
Earlier notification about availability of ADR to litigants/attorneys	70.37%	25.93%	0.00%

Research interview subjects indicated the need for a dedicated ADR information center helping to provide parties and attorneys with useful information on ADR availability, benefits and so on. But these centers would have to be resources with a permanent staff.

Like for example, if we had an ADR center where information was available and people could sign up to meet with the mediator—let's say, they are there Tuesdays and Thursdays from 10 to 4, and that there are so many slots and people can actually sign up. But again, if those people are volunteers and there isn't somebody that has the time to be that person coordinating. I don't think it will be successful.

Person-to-person contact – which the majority felt would be more effective than passive promotions through the internet, pamphlets or videos – would incur significant costs.

It is fighting against the tide in our country right now to have person-to-person contact, but I totally agree that that is the way most people really hear things and come to trust things and can respond. It is very labor intensive—it is very labor intensive—not easy for a court who is looking for efficiency.

One option is to use existing Court Service Centers to make personal contact a reality. These centers are already staffed by individuals who are ADR-aware. But these centers are not available throughout the Commonwealth, and are tasked with providing a host of other services besides providing ADR information.

There happens to be one in Suffolk—there's one in my building—there's one up in Greenfield—they have what are called court service centers. And we have talked about doing more with them to get the word out about ADR. And that's certainly something that needs more attention a good remind for us. Because there are these sort of frontline people coming in and saying "this has happened to me, what do I do?" So the court service centers would be a good source—plenty of people know about ADR options.

And part of that has been now demonstrated. We have court service centers at six of our largest busiest courthouses that have multiple departments. But the Court Service Center folks have learned about ADR, but it is just a portion of the information that they're being asked to share with the many people who come through. To [name of person] point, if we don't make ADR the priority or the main focus, then the message can get diluted.

Some interviewed court persons emphasized the need to increase ADR awareness before parties arrive in court. One strategy proposal is to launch a public relations

campaign to educate all relevant stakeholders like the lawyers through Bar Associations and through brochures, posters and publications such as Lawyer's Weekly, as well as other media.

I think we can do increased reaching out to both lawyers and to litigants to let them know—sort of a public relations offensive—to let them know ADR is an option—it's part of the court system. We have multiple approved providers—that can be done with—well, it certainly should be done—now that we have a Trial Court website that certainly should be done there. I guess you could give consideration to actually reaching out to the media to get some stories from time to time. And I think when people come up with good ideas, one thing that happens to them is it's a one-day splash and people go, oh, that's really interesting. And then it gets forgotten about thereafter. So with some reminders on it. But reaching out to the [inaudible] bar associations—Mass Bar, Boston Bar, Lawyers Weekly, for whatever kind of causative reinforcing information would be appropriate to let people know about ADR options and then within the court system itself—we've done this from time to time—brochures, posters.

A strategy that was described is the creation of an ADR promotional video and making it available on the internet and on court premises. A training video was also suggested for new judges and attorneys.

I'm in favor of a video and we're planning for a video. I would actually like to see two videos—one on the website for anyone to look at—and then one restricted one for judges as part of either training for new judges or just be there for a reminder. The one we will do first will be the one on the website for the public—be it lawyer, litigant, or just interested parties and persons. It has to be short—five or six minutes tops.

I'm part of the video committee and we're producing a video. And all of that is for awareness and I think that when the parties come to our court, if they can learn about ADR beforehand, that would be great.

So it's my understanding, and I don't know if the decision has been already made, it's my understanding that they're thinking about putting something on the internet. I don't know if there would be room to show an ADR video to the parties, I don't know if it has been considered to show the parties a video as they wait for their cases to be called. Because at least in the courts, they start at 9 or at 2 and I don't know how much sooner the parties can come in to sit through an ADR video. I don't know when that would be shown in the court. But I do know that they were thinking of showing it on the internet.

Other interviewees mentioned the limitations of using an ADR video to raise ADR awareness and increase utilization of ADR. These include finding common definitions to allow the video to work across the diverse court divisions and their diverse portfolio of cases. ADR is also not available in all courts, and playing a video in a loop might raise expectations that the court might not be able to meet. There was however more traction with the idea of placing more information about ADR on the internet.

...so last week I saw a video that they do in New Hampshire for people's first appearance in family court—it was about 10 minutes long. It was pretty good and I think they actually require people to sit and watch it the first time they come in. I think that's a little harder to do.

Also just to let you know, we do have a video in one of our court divisions playing. We have worked with that to expand that. The challenge again is a matter of finding the common definitions that work across all the divisions. Making sure that we're not building expectations of an available service if it's not available in every location and making sure that the definition of the service is understood uniformly. That's a challenge between divisions and that's a challenge between departments.

I think the website, people use them voluntarily and intermittently, but I think that would be valuable. The video loop, you would need—there are 10 different sessions with 10 different judges, and I am not clear, they now run pretrial conference that does include answering a question, have you discussed ADR. I don't know how a video how a video loop would fit into that conference. Every day in every one of the 10 sessions, there will be a handful of these pretrial conferences. That is another moment of information delivery. I don't know that a video loop would help, and I don't know where you would put it in the SC, but I do think the website is helpful.

The majority of the survey responders (52% or $n=13$) strongly agreed that information should be provided to litigants before they arrive in court through online materials and materials distributed with the filing. A significant minority (40% or $n=10$) also agreed that information about ADR should be provided to litigants when in court.

Table 14: Importance of Providing Information to Litigants ($n=28$)

	STRONGLY AGREE		NEITHER AGREE NOR DISAGREE	STRONGLY AGREE	AGREE
Information is needed to explain ADR to litigants:		DISAGREE			
Before litigants arrive at court (e.g., by way of online materials, materials distributed with filing):	0.00%	4.00%	4.00%	52.00%	40.00%
In Court:	8.00%	4.00%	8.00%	32.00%	48.00%

In the research interviews, some court personnel from the Superior Court (SC) recommended that the SC reexamine some type of early intervention ADR screening in which face-to-face ADR information could be provided to parties and their attorneys. However, this was an approach that ran into some difficulties in the past.

That is why the original program we did with Susan so long ago, had an explicit ADR screening event. It is permitted under the SJC Rules, you are allowed to have an ADR screening event and we used to do that—where 10-15 cases were called in, the lawyers were called in, I made that speech that I talked about, information was given, available in writing to everyone, and an administrator was there in the courtroom to sign you up on the spot, for the single provider that MOTR ran. But ultimately it was abandoned. One: because the private ADR

providers were opposed to it, and secondly there was a feeling from the bar, the lawyers began to communicate to the chief judges and so on, that they really weren't ready, they felt they would prefer to choose ADR when they wanted it, but they didn't like being compelled to come to a court session and hear a speech when they still had discovery to do, motions. They did not think it was productive use of their time. So, the early intervention event, where there was face to face delivery of information was dropped. Now there is lots of folks in the literature who suggest that (early) intervention is popular idea in ADR for years, and the SC has moved moderately towards an earlier intervention case management. The SC rules have been around, maybe 2-3 years now, for selected cases to have at the request of the trial case judge or the attorney a case management early event. ADR's not particularly built into that.

Some court departments need in-house ADR resources, particularly to help people who do not have the ability to pay for the ADR services. The current in-house ADR resources at the Superior Court need to be improved. The idea is to absorb additional personnel to provide ADR services, preferably retired judges and to help support the role of the ADR providers.

Yes, I think the SC, whether it is income restricted or not income restricted, I think the SC should have more ADR in-house providers. Whether they are retired judges, court staff, retired courts (clerk magistrates?)—Yes, I think that the number of providers is not adequate and I think the outreach, the effort to grab cases or (garbled) should be improved.

Other ideas for improving provider capacity included provision of financial supports to volunteer ADR providers. Financial supports for community mediation centers would help centers recruit and retain an ADR workforce, making the centers more sustainable and a more reliable resource for local courts that need ADR services.

If there were funding from the TC for ADR services—then it would—I believe it would help the community mediation programs recruit and train and then pay people to do this work. If that were possible—a clear valued career track—then people might come into it more.

The above idea is in line with the findings from the survey. The majority of survey responders (78%) indicated that more information about ADR programs would increase ADR awareness, access, and utilization. Another large majority indicated the need to provide more state funding for court-connected ADR programs.

Table 15: Options to increase ADR awareness, access and utilization (n=28)

Would any of the following options increase ADR awareness, access, and utilization?	Responses
More state funding for court-connected ADR programs	64.29%
Surcharge added to filing fees to support court-connected ADR	17.86%
Availability of more types of ADR processes	39.29%
More information about ADR programs	78.57%

Increase staff hours to administer court-connected ADR	25.00%
Other (please specify)	3.57%

Another court person interviewed indicated the importance of on-going trainings for new judges that are currently underway. Another interviewed court person specified the work being done to train attorneys and bar associations in ADR processes like conciliation and mediation.

Well I think we, we do a lot of judge education on the subject—it's a part of our new judge training—it's a part of most educational programs. I stand up and sort of report on the status of ADR in the Superior Court. I think we should continue to do that. That is to say— judge education on the subject of ADR would probably be the best.

The availability of trainings is actually quite good. In other words, when we have bar associations who want to train members to be ADR providers—there are a number of options for getting them trained in both conciliation and mediation. So we're pretty good about doing that.

Interviewed court persons also had ideas on how to change the organizational culture of the Trial Court to becoming more open to institutionalizing ADR.

It is not a little add-on. It needs to be a part of solving human problems in the justice system to me. That just seems so clear, and I think the only way to do it is with very charismatic leadership commitment to it, because if someone is that committed, they could bring the kind of inspiration—I think—to the other judges and bring the kinds of supports that those judges would need—to learn how to refer appropriately—how to talk about ADR to people—I think it is a leadership issue.

Some interviewed court persons noted the need for systemic/structural adjustments in order to integrate ADR into the Trial Court. This included ideas for changing the terminology used to frame ADR from “Alternative” to “Appropriate” Dispute Resolution as well as providing education and other structural changes supports, like funding for mediation, that would further cement ADR as an institutional resource for the Trial Court.

Well, one of my goals in the work that I've been doing is to get ADR integrated into the court system. I want it to be part of the court system. And I've talked about this and actually the, the red book, which you're familiar with— I am working on the new forward in it. And one of the things I talk about is nomenclature. So I heard a speech last week by someone from the National Center for State Courts saying why you should no longer call ADR alternative dispute resolution. And it shouldn't be an alternative and there can be considered pejorative to be called alternative. It used to be an alternative— but call it dispute resolution. I was talking with the person afterwards and I said, I totally agree with the sentiment. What I will tell you is if you say DR to somebody in the court house, they don't know what you're talking about. Say ADR they

know even though they know—they might not provide details but they know ADR means mediation or arbitration conciliation. And I said where I've gotten to is—oh and the second thing I would say is if you say to someone, have you considered dispute resolution? That doesn't flow as well when you are talking—so what I've said is, I think you can still call it ADR, but the "A" has a new word which is "appropriate". And so I, am now a believer in still saying ADR calling it "appropriate dispute resolution" and you have it part of the system. It should be woven into the fabric of the court system. And I think slowly that's happening.

I think my point, presence in court, organized structure, mediators paid, and again education about—that it's not all—it doesn't have to be everything—but can be part a part of the case. So just the education of some of the different services. And also I feel that the requirement or the impression that rule 118 requires the court approved mediator to be a program, I think changing that would provide for more of a pool of trained and qualified mediators that would be able to assist in this objective.

Another identified clear need is to create a standardized and centralized data collection system to demonstrate the results achieved through court-connected ADR.

It has to be standardized, so everyone is capturing the same information so that the information that we put in can then be pulled out to be accurate statistics, so we know is this working? Do people know about it? Are there reports coming back? Are the programs giving us all the information that we want? Are we, should we have proper follow up?

So what you need is a central person in each of the seven Trial Court departments who has a responsibility to collect the data on how mediation works. Our court for example, there are at least two and maybe three different administrators that work with these retired judges (us mediators)—I don't know who helps JM with his cases—but there is no central place where the administrators who are sending out cases and helping us schedule—where they can send the data. I know the woman I work with has data on every mediation that I have done and every mediation that JS has done. She knows the dates, which court it came from, which judge it came from, when/where the mediation was held, whether it was successful or not. I do not know if that data goes anywhere, or is centralized by anyone from the....SC, so I think you need to revitalize what I believe is already a rule, by having some centralized data collection...because the way the four operate (meaning they give their data to their administrators and it is not shared).

The court is currently using MassCourts – a court case management system that can help track court-connected ADR data.

We have a computerized system MassCourt—once we log in a referral, we get the case notes from the probation officers, we get the results, the closing, and those numbers are very helpful for us because it's done on a monthly basis. We know how many cases are done by each court per month, how many get settled,

what each PO is doing, what payer agreement rates are. So it gives us a chance, by looking at these statistics to gauge the DI process that we're offering. Has it been successful? What it looks like, how many people in the public are we serving with this, and how many cases get diverted to probation rather than straight into the courtroom. So all of that information hopefully—each department is doing that—which would give us a better sense of measuring all of the things that we talked about—access to ADR processes, utilization, and awareness.

The court case management system could be useful in tracking ADR related data to demonstrate utilization and a number of other outcomes. However, in order for the system to start collecting information, the Trial Court might have to define what types of data it needs to demonstrate the success of court-connected ADR in Massachusetts.

It may be beneficial for the court to rethink its goals for measuring ADR success in the traditional terms of time and cost efficiencies. An overemphasis on time and cost efficiencies may prevent the measurement of other gains like the preservation of party relationships for example.

...increasing efficiency has been the “buy” word for judges to adopt ADR in their courts. Efficiency, especially when they were very overwhelmed with cases, which that sort of ebbs and flows, but from my perspective; although that maybe the way to “sell” it, I don’t think you sell the right product when you go down that road. I think the product that really needs to be sold is the value of ADR to the people that are experiencing it when it is done right—you know when you are not banging people’s heads together to get agreements and pushing them to a quick resolution and that kind of thing that can happen in an efficiency-type model. The reason I think that is the best way to go is that, even for judges, part of the disgruntlement about their role, I think, is that they always see people in very difficult places in their lives and they often cannot really see positive, forward looking experience in the trial court. Whereas, if the focus was on how it could help the people in front of them, it could help to humanize the court system more. And with that, I think, would come greater job satisfaction. That is easy to put into words. It is very hard to put into a complicated administrative system. But, I think we really give up something when we focus only on efficiency.

But, the danger in this big of a system, and this big of a system that has been antagonistic towards ADR—or at the very least, not much committed to it—the only way to do that is to figure out how to tell the human stories. I do think—efficiency helps—I am not against efficiency, but I think that it is very typical of a big institution to go towards efficiency and somehow believe that that is going to solve some of the bigger problems of the system, and I think that the only things that solve the bigger problems of the system is to figure out how to get to the hearts of the human beings involved in the system

There is also a need to understand what the data would or should mean. Why is the data being collected? For what purpose? Who is the audience? These are some of the key questions to consider. This should be thought through before the data is collected.

It would be a whole second step, the first would be getting someone to collect it in the first place, which is hard enough, then the next step would be to sit down and figure out what it means. You could sit down with us four mediators in SC and share it with us and say: “listen this is what see from the four of you over the year, what do you think, is this accurate? Does it suggest any changes?” You could sit down with the chief justice (CJ) who actually approved us four working in this capacity, she wants us here. I should add to this a significant player to this is the CJ of each of 7 departments of the TC. They will ultimately want to know and approve whatever type of centralized data collection takes place. And I am sure they would want to know the results of any analysis—I mean the analysis might show we need two more retired judges; the case load is too high. Or we need to give more information to the trial judges—we are giving enough referrals—the workload is too low because not enough judges are utilizing the program. So, yes, I think your analysis makes sense.

Interviewed court personnel had different performance measures they would like to use, including party outcomes, settlement outcomes, and party satisfaction as well as ideas for collecting data about those measures through exit interviews, surveys, economic analyses and case studies/story-telling approaches.

If the parties actually enter the process and then if they did enter the process, did it settle? Did it not settle? Did they decide that they were going to drop out? Was there a partial settlement? You know, so they do report back to the court what actually happens after the referral.

Surveys, we talked a little bit about surveys. You know, that could be a good tool in gauging what people understood—what they thought when they participated in the process—if it was explained to them clearly—what they thought about the process—would they use it again—recommend it to somebody who they know who is filing for a divorce in the court—recommend it to their friend to try out this process. All of that would help in increasing the level of awareness, access, utilization of all the ADR process in the court.

I think you would have to do some exit interviews of some sort with folks that have been in the court system and chosen mediation—as to why they might have (you know if their case has been pending for a year) they decided to choose mediation. You would have to check with attorneys as to why their clients authorized them, as you know there is often attorney reluctance to go into mediation, this concern that it makes the attorney look like they want to settle the case—or the attorney does not look aggressive enough. Also, (attorney concern) that there are still motions or discovery to do. So, I think it would take some interviews to find out what lawyers are hearing from their clients as to choosing this in the middle of a pending case.

Mads made reference to a study I participated in quite a few years ago, we did try to measure how much time was saved by a successful mediation by asking attorneys their projected trial time and trial expenses. I think that is the economic data that Mads made reference to. That (study) is very old, it could be done again—easily to interview lawyers about what the time and cost—as to what mediation offers in saving time and money. So, your question is: do you want to measure satisfaction?

The ways, that tell the stories of successes, is to hear the stories of successes. When they are not, they tell you all the faults with the system. I do not know how that transfers into measurement.

I'd love to see statistics on how often these cases come back, but I don't have any of those statistics.

Other ideas for Increasing Court-connected ADR based on Lessons from other States

As part of the study, survey responders were also asked to identify a list of effective practices from other states that they thought would be effective in raising ADR awareness, access and utilization in Massachusetts. The most significant majority of those surveyed identified the practice of provide informational literature about ADR with filing materials (73%); greater uniformity among the courts in providing ADR services (70%); establishing a dedicated court-connected ADR website, including access to videos, forms, surveys, and other materials (69%); regular updating of information about ADR for use as a resource by court personnel in assisting litigants and using trained volunteers to provide ADR services (62%); and requiring documentation of attorney-client discussion of ADR and decision about participating in ADR to accompany filing (50%) are some of the effective practices from other states that would be effective in Massachusetts.

Table 16: Practices from other states that could increase ADR utilization in MA (n=28)

Practices from other states that could be effective in raising ADR awareness, access and utilization in MA	Effective	Somewhat Effective	Not Effective	N/A
Greater uniformity among the courts in providing ADR services	70.37%	22.22%	7.41%	0.00%
ADR video to be viewed by litigants on court premises	34.62%	34.62%	26.92%	3.85%
Regularly update information about ADR for use as a resource by court personnel in assisting litigants	62.96%	29.63%	3.70%	3.70%
Establish a dedicated court-connected ADR website, including access to videos, forms, surveys, and other materials	69.23%	19.23%	7.69%	3.85%
Require documentation of attorney-client discussion of ADR and decision about participating in ADR with filing	50.00%	25.00%	25.00%	0.00%

Mandate screening or pilot mandatory participation in ADR for some case types	40.74%	40.74%	14.81%	3.70%
Charge parties for court ADR services, except under specified circumstances (e.g. indigence, certain types of cases)	15.38%	11.54%	65.38%	7.69%
Impose a filing surcharge to help fund court-connected ADR services	14.81%	22.22%	48.15%	14.81%
Use trained court staff to provide ADR services	46.43%	25.00%	21.43%	7.14%
Use trained volunteers to provide ADR services	62.96%	22.22%	14.81%	0.00%
Provide informational literature about ADR with filing materials	73.08%	19.23%	3.85%	3.85%